Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22-63 OF 1995
JEFFREY TAN J
1 JUNE 1998

Succession *— Estate — Claim by beneficiaries — Allegation that gifts made by deceased prior to his death were made under undue influence — Whether such gifts should be returned to the estate*

Succession *— Probate — Testamentary capacity — Allegation that testator had no testamentary capacity — Unsoundness of mind and undue influence — Onus of proof*

Succession *— Will — Execution — Validity of — Will prepared by a beneficiary whose family took extraordinary portion of deceased's properties and assume all power under the will — Whether proof of undue influence over deceased in execution of will — Whether will offends s 5 of the Wills Act 1959*

Succession *— Will — Execution — Allegation of senility — Whether deceased had the necessary testamentary capacity while executing his will — Who bears burden of proving righteousness of transaction and document propounded to be will of deceased*

Succession *— Executors — Discharge of — Whether there was due and proper administration of estate — Whether executors were proper persons to look after interests of the estate and beneficiaries as a whole — Whether estate if left in executors' hands would probably be loaded and rendered of little value — Whether executors ought to be discharged*

The deceased was a man of great wealth and possessed various properties both locally and overseas. The paintiffs and the defendants are his children and grandchildren. The action concerns wills purportedly executed by the deceased over his real and personal property in Malaysia, Thailand and US. The plaintiffs propounded three wills dated 24 October 1990 ('1990 wills') as the last will of the deceased. The first, second and third defendants — the latter two being the first defendant's sons — ('the first to third defendants') conceded that the 1990 wills were true wills of the deceased; however, they propounded three wills dated 3 August 1992 ('1992 wills') — purportedly prepared by the third defendant — as the last will of the deceased. The fourth and fifth defendants — a father and adopted daughter team — who claimed that there were no true wills, propounded the intestacy of the deceased. The plaintiffs claimed as well, inter alia, for the return or restitution of substantial properties and including a piece of land ('the Teluk Bahang land') that the first to third defendants allegedly extruded and peculated in the last year of the deceased's life and for the removal of the first to third defendants as executors and trustees of the estate. The first to third defendants submitted that all such properties were gifts from the deceased to them. At the trial, the first defendant chose not to give evidence from the witness box. It was argued, inter alia, that the deceased, at the time of the execution of the 1992 wills was senile and thus lacked the

necessary testamentary capacity to make a will. It was also submitted that the deceased was coerced and/or unduly influenced to make the gifts and 1992 wills. The deceased was, up to the last few days before his death, staying with the first defendant's family.

Held, pronouncing the force and validity of the last will and testament dated 24 October 1990; ordering the transfer of the Teluk Bahang land to the executors and trustees of the estate, and the return of properties received by the first to third defendants purportedly as gifts from the deceased; and discharging the first and second defendants as executors and trustees of the estate:

(1) There was no evidence at all that the deceased understood that he was signing a transfer of the Teluk Bahang land to the first defendant. The deceased in the position he was — in relation to the first defendant and his family — ought to have been in full view of what he was doing. But there was no evidence at all that care and providence had been taken by the first defendant to ensure that the deceased was put in possession of all material facts and information so as to enable the deceased to decide freely what he wanted to do with the Teluk Bahang land. By keeping silent, the first defendant had actively concealed the material facts and thus committed dishonesty against his siblings if not against the deceased. There was also no evidence to rebut the inference that the first defendant's testimony if given would have been unfavourable to the asserted gift of the Teluk Bahang land (see p 596F–H, I).

(2) The first defendant and his family — who stood in such a relationship that while its continued confidence was necessarily reposed by the deceased and influence possessed by the first defendant and his family — were called upon to act with good faith and they had the burden of proving that the gifts were not brought about by undue influence. And they — who bears the burden of proof of absence of undue influence — failed to show that the transactions were fair and reasonable, that no advantage had been taken of his position and that no information which should have been communicated had been withheld. They failed to dispel bad faith. Undue influence, that proved as well as presumed, was not rebutted (see p 606B–D).

(3) The circumstances attending the execution of the 1992 wills were that suspicious that even if undue influence was not proved, but it was, the court is not satisfied as to the righteousness of the transaction. The third defendant who prepared the wills under which he and his family took their extraordinary bounty and assumed all power failed to substantiate the truth, honesty and righteousness of the 1992 wills. He failed to give clear proof that the deceased knew and approved of that part under which he and his family took their extraordinary benefits. Therefore, the 1992 wills purporting to be executed by the deceased have no validity whatsoever and cannot be admitted to probate (see p 616G–I).

Moreover, there was non compliance with s 5 of the Wills Act 1959 resulting in the due execution of the wills not being proved.

(4) All things considered, it must be deduced that the deceased understood and approved the provisions of the 1990 wills. The plaintiffs who propounded the 1990 wills had discharged the burden of showing the righteousness of the transaction and that the document propounded expressed the true last will of the deceased. This means that the 1990 wills are the true last wills of the deceased and can be admitted to probate (see p 628G).

(5) There was no due and proper administration of the estate. Truly, the first to second defendants had disqualified themselves by their conduct from continuing the office. Their neglect of duty or inaccuracy of conduct, their acts or omissions showed a want of proper capacity to execute the duties. Judging by the events from June 1992, it could be fairly said that the estate if left in their hands would probably be loaded and rendered of little value (see p 635D–F).

[Bahasa Malaysia summary

Si mati adalah seorang yang kaya dan memiliki banyak harta di dalam dan di luar negeri. Plaintif-plaintif dan defendan-defendan adalah anak-anak dan cucu-cucunya. Tindakan ini adalah berkaitan dengan wasiat yang kononnya dilaksanakan oleh si mati atas harta tanah dan harta alihnya di Malaysia, Thailand dan US. Plaintif-plaintif mengemukakan tiga wasiat bertarikh 24 Oktober 1990 ('wasiat 1990') sebagai wasiat terakhir si mati. Defendan pertama, kedua dan ketiga — defendan kedua dan ketiga adalah anak-anak lelaki defendan pertama — ('defendan pertama hingga ketiga') bersetuju bahawa wasiat 1990 adalah wasiat sebenar si mati; tetapi, mereka mengemukakan tiga wasiat bertarikh 3 Ogos 1992 ('wasiat 1992') — yang kononnya disediakan oleh defendan ketiga — sebagai wasiat terakhir si mati. Defendan keempat dan kelima — seorang ayah dan anak angkat perempuan — yang menuntut bahawa tidak ada wasiat yang sebenarnya, mengemukakan kematian tak berwasiat si mati. Plaintif-plaintif juga menuntut, antara lain, untuk pengembalian atau restitusi sebahagian besar harta dan termasuk sebidang tanah ('tanah Teluk Bahang') yang mana defendan pertama hingga ketiga dikatakan telah melesapkan pada tahun terakhir kehidupan si mati dan pembuangan defendan pertama hingga ketiga sebagai wasi-wasi dan pemegang-pemegang amanah harta pusaka itu. Defendan pertama hingga ketiga berhujah bahawa semua harta itu merupakan alang daripada si mati kepada mereka. Pada masa perbicaraan defendan pertama memilih untuk tidak memberi keterangan daripada petak saksi. Adalah dihujahkan, antara lain, bahawa si mati, pada masa pelaksanaan wasiat 1992 adalah nyanyuk dan dengan itu tidak

mempunyai keupayaan perwasiatan yang perlu untuk membuat wasiat. Adalah juga dihujahkan bahawa si mati dipaksa dan/atau telah dipengaruh secara tidak wajar untuk membuat alang dan wasiat 1992. Si mati tinggal bersama keluarga defendan pertama hingga beberapa hari sebelum kematiannya.

Diputuskan, mengisytiharkan penguatkuasaan dan kesahan wasiat terakhir bertarikh 24 Oktober 1990; memerintahkan pindahmilik tanah Teluk Bahang kepada wasi-wasi dan pemegang-pemegang amanah harta pusaka, dan pengembalian harta-harta yang kononnya diterima oleh defendan pertama hingga ketiga sebagai alang daripada si mati; dan melepaskan defendan pertama dan kedua sebagai wasi-wasi dan pemegang-pemegang amanah harta pusaka:

(1) Tidak ada bukti langsung bahawa si mati faham yang dia menandatangani pindahmilik tanah Teluk Bahang kepada defendan pertama. Si mati dalam keadaannya yang demikian — berhubung dengan defendan pertama dan keluarganya — sepatutnya mengetahui sepenuhnya tentang apa yang dilakukannya. Tetapi tidak ada bukti langsung bahawa defendan pertama telah mengambil perhatian untuk memastikan bahawa si mati mengetahui semua fakta-fakta dan maklumat yang material supaya si mati dapat membuat keputusan dengan bebas apa yang dia hendak buat dengan tanah di Teluk Bahang. Dengan berdiam diri, defendan pertama telah dengan aktifnya menyembunyikan fakta-fakta material dan dengan itu melakukan ketidakjujuran terhadap adik-beradiknya jikapun tidak terhadap si mati. Juga tiada bukti untuk mematahkan inferens bahawa testimoni defendan pertama jika diberikan tidak akan berpihak kepada tuntutan alang tanah Teluk Bahang (lihat ms 596F–H, I).

(2) Defendan pertama dan keluarganya — yang mana hubungan membuatkan si mati menaruh keyakinan yang berterusan dan pengaruh defendan pertama dan keluarganya — adalah perlu bertindak dengan suci hati dan mereka mempunyai beban membukti bahawa alang itu tidak datang daripada pengaruh tidak wajar. Dan mereka — yang menanggung beban membukti ketiadaan pengaruh tidak wajar — gagal untuk menunjukkan bahawa transaksi itu adalah adil dan munasabah, bahawa tiada kesempatan telah diambil daripada kedudukannya dan bahawa tiada maklumat yang sepatutnya dikomunikasikan telah disembunyikan. Mereka gagal untuk menghilangkan niat jahat. Pengaruh tidak wajar, yang dibuktikan dan juga dianggap, tidak dipatahkan (lihat ms 606B–D).

(3) Keadaan-keadaan semasa pelaksanaan wasiat 1992 penuh dengan syak wasangka dan jikapun pengaruh tidak wajar tidak dibuktikan, tetapi ianya telah dibuktikan, mahkamah tidak berpuas hati tentang sama ada transaksi itu betul atau tidak. Defendan ketiga yang menyediakan wasiat itu di mana dia dan keluarganya

mengambil ganjaran yang luar biasa dan mengambil semua kuasa gagal untuk menunjukkan kebenaran, kejujuran dan betul atau tidaknya wasiat 1992 itu. Beliau gagal untuk memberi bukti yang jelas bahawa si mati tahu dan meluluskan apa yang dia dan keluarganya ambil manfaat yang luar biasa. Oleh itu, wasiat 1992 yang kononnya dilaksanakan oleh si mati tidak mempunyai kesahan apa pun dan tidak boleh diterima kepada probet (lihat ms 616G–I).

Tambahan pula, terdapat ketidakpatuhan kepada s 5 Akta Wasiat 1959 yang menyebabkan pelaksanaan wasiat itu tidak dibuktikan.

(4) Semua perkara-perkara ini dipertimbangkan, adalah mesti disimpulkan bahawa si mati faham dan meluluskan peruntukan-peruntukan wasiat 1990. Plaintif-plaintif yang mengemukakan wasiat 1990 telah melepaskan beban untuk menunjukkan bahawa transaksi itu adalah betul dan bahawa dokumen yang dikemukakan menyatakan wasiat akhir si mati yang sebenar. Ini bermakna bahawa wasiat 1990 adalah wasiat terakhir si mati yang sebenar dan boleh diterima kepada probet (lihat ms 628G).

(5) Tidak ada pengurusan yang betul berkenaan dengan harta pusaka itu. Sebenarnya, defendan pertama dan kedua telah hilang kelayakan mereka kerana tindak-tanduk mereka daripada terus menguruskan urusan itu. Kecuaian terhadap tugas atau tindakan yang tidak tepat, tindakan atau peninggalan mereka menunjukkan keperluan keupayaan yang sewajarnya untuk melaksanakan tugas-tugas itu. Menghakimi daripada peristiwa-peristiwa daripada bulan Jun 1992, boleh dikatakan secara adil bahawa harta pusaka itu jika dibiarkan di bawah urusan mereka mungkin akan dimuslihatkan dan mempunyai nilai yang sedikit (lihat ms 635D–F).]

[*Editorial note*: The first to third defendants, and the fourth and fifth defendants, have respectively filed an appeal to the Court of Appeal.]

Notes

For cases on execution of a will, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2090–2094.

For cases on executors, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1828–1901.

For cases on testamentary capacity, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1998–2006.

Cases referred to

A Solicitor, Re [1952] 1 All ER 133 (refd)
A-G v Windsor 24 Beav 679 (refd)
Allcard v Skinner (1887) 36 Ch D 145 (refd)

Allen v M'Pherson (1847) 1 HL Cas 191 (refd)
Amos William Dawe v Development & Commercial Bank (Ltd) Bhd [1981] 1 MLJ 230 (refd)
Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, the deceased) [1997] 2 MLJ 45 (refd)
Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22 (refd)
Atter v Atkinson (1869) LR 1 P & D 665 (refd)
Austen v Graham (1854) 8 Moo PCC 493 (refd)
Bahin v Hughes (1886) 31 Ch D 390 (refd)
Banks v Goodfellow (1870) LR 5 QB 549 (refd)
Bannatyne v Bannatyne (1852) 2 Rob Eccl 472 (refd)
Barry v Butlin (1838) 2 Moo PC 480 (refd)
Baudains & Ors v Richardson & Anor [1906] AC 169 (refd)
Benoy v Santi 40 CWN 45; 62 CLJ A99 (refd)
Bird v Luckie (1850) 8 Hare 301 (refd)
Boyse v Rossborough (1857) 6 HLC 2 (refd)
Bridgman, Re 29 LJ Ch 844 (refd)
Brown v Fisher (1890) 63 LT 465 (refd)
Burrows v Burrows (1827) 1 Hag Ecc 109 (refd)
Carpenter v Heriot (1759) 1 Eden 338 (refd)
CEC v Comptroller of Income Tax [1971] 2 MLJ 43 (refd)
Chartered Bank, The v Yong Chan [1974] 1 MLJ 157 (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (refd)
Chetwynd's Settlement, Re; Scarisbrick v Nevinson [1902] 1 Ch 692 (refd)
Chong Siew Chiang v Chua Ching Geh [1995] 1 MLJ 551 (refd)
Cleare v Cleare (1869) LR 1 P & D 655 (refd)
Constable v Tufnell (1833) 4 Hag Ecc 465 (refd)
Craig v Lamoureux [1920] AC 349 (refd)
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196 (refd)
Den v Vancleve 2 Southard 660 (refd)
Dew v Clark and Clark (1826) 2 Add 79 (refd)
Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61 (refd)
Duke of Norfolk's Settlement Trusts, Re [1978] 3 All ER 907 (refd)
Esso Petroleum Co Ltd v Southport Corp [1955] 3 All ER 864 (refd)
Finny v Govett (1908) 25 TLR 186 (refd)
Fulton v Andrew (1875) LR 7 HL 448 (refd)
Garnett-Botfield v Garnett-Botfield [1901] P 335 (refd)
George Lee Chin Nam v Lie Chin Man [1996] 1 CLJ 82 (refd)
Green v Skipworth (1809) 1 Phillim 534 (refd)
Gregson v Taylor & Ors [1917] P 256 (refd)
Guardhouse v Blackburn (1866) LR 1 P & D 109 (refd)
Gurbakhsh v Gurdial 1927 PC 230; 32 CWN 119 (refd)
Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991]1 MLJ 33 (refd)

A *Hall v Hall* (1868) LR 1 P & D 481 (refd)
Harmes v Hinkson (1946) 90 SJ 515 (refd)
Hartley, Re; Hartley v Fuld (Fuld intervening) (No 3) [1965] 3 All ER 776 (refd)
Hastilow v Stobie (1865) LR 1 P & D 64 (refd)
Hegarty v King (1880) 5 LR Ir 249; affd 7 LR Ir 18 (refd)
B *Henderson, Re; Henderson v Henderson* [1940] Ch 764, 3 All ER 295 (refd)
Inche Noriah v Shaik Allie bin Omar [1929] AC 127 (refd)
Jigarlal Kantilal Doshi & Ors v Damayanti Kantilal Doshi & Ors [1995] 3 AMR 2590 (refd)
C *Khoo Boo Gong, deceased, Re; Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68 (refd)
Kiaw Aik Hang Co Ltd v Tan Tien Choy [1964] MLJ 99 (refd)
Leith McDonald Ratten v The Queen [1972] AC 378 (refd)
Lim Kim Hua v Ho Chui Lan & Anor [1995] 3 MLJ 165 (refd)
D *Lum Yoon Kow decd, In the Estate of; Lum Hor Choong v Hew Lye Heong & Lam Cheok Tong* [1936] MLJ 136 (refd)
Marsh v Tyrrell and Harding (1828) 2 Hag Ecc 84 (refd)
Mcqueen v Great Western Railway Co (1875) QBD 569 (refd)
Md Hussain v Secretary of State AIR 1939 Lah 330 (refd)
Middleton v Forbes (1787) cited in *Ingram v Wyatt* (1828) 1 Hag Ecc
E 384 (refd)
Moyle v Moyle (1831) 2 Russ & M 710 (refd)
Mudway v Croft (1843) 3 Curt 671 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Nandalal v Dasarathi 61 CLJ 304 (refd)
National Westminster Bank plc v Morgan [1985] 1 All ER 821 (refd)
F *Ooi York Choo v Lim Song Foundry* [1963] MLJ 87 (refd)
Parfitt v Lawless (1872) LR 2 P & D 462 (refd)
Parslow, Re; Parslow v Parslow (1959) The Times, 3 December (refd)
Pearse v Green (1819) 1 Jac & W 135 (refd)
Pranballav v Tulsibala (1958) Cal 713; 63 CWN 258 (refd)
G *R, Re; the deceased* [1951] P 10 (refd)
Rachael Mei Ling Ong & Anor v Dato' Bruno Henry Almeida (as the executor for the estate of Ong Soon Hoe, deceased) [1998] 6 MLJ 258 (refd)
Robinson v Pett (1734) 3 P Wms 249 (refd)
Rookes v Barnard & Ors [1964] AC 1129 (refd)
H *Roshairee bin Abd Wahab v Mejar Mustafa bin Omar & Ors* [1997] 2 AMR 2044 (refd)
Saraswatee d/o Arumugan & Anor v Tan Chong & Motors Co Sdn Bhd [1985] 1 MLJ 327 (refd)
Simpson, Re; the deceased; Schaniel v Simpson (1977) 121 SJ 224
I (refd)
Smith v Kay (1859) 7 HL Cas 750 (refd)
Smith v Tebbitt (1867) LR 1 P & D 354 (refd)
Sooriah v Cotaghery 2 MIA 113 (refd)

Spedding v Fitzpatrick (1888) 38 Ch D 414 (refd)
Springett v Dashwood (1860) 2 Giff 521 (refd)
Subramaniam v Public Prosecutor [1956] 1 WLR 965 (refd)
Sutton v Sadler (1857) 3 CBNS 87 (refd)
Symes v Green (1859) 1 Sw & Tr 401 (refd)
Synn Lee & Co Ltd v Bank of China [1962] MLJ 395 (refd)
Tate v Williamson (1866) 2 Ch App 55 (refd)
Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265 (refd)
Thulai v SA 1973 SC 501 (refd)
Trailakhya v Kenaram 61 CLJ 551 (refd)
Tyrrell v Painton & Anor [1894] P 151 (refd)
U Po v Edward 1934 Rang 139 (refd)
Udham Singh v Indar Kaur [1971] 2 MLJ 263 (refd)
Venkataramier v Krishnammal 52 Mad LJ 20; AIR 1927 Mad 259 (refd)
Virendra v Jagiwan 1974 SC 1957 (refd)
Waghorn v George Wimpey & Co Ltd [1970] 1 All ER 474 (refd)
Wallace & Ors, Re; Solicitor of the Duchy of Cornwall v Batten [1952] 2 TLR 925 (refd)
Waring v Waring (1848) 6 Moo PCC 341 (refd)
Webb, Re; the deceased; Smith v Johnston & Ors [1964] 2 All ER 91 (refd)
Wheeler and Batsford v Alderson (1831) 3 Hag Ecc 574 (refd)
William Loveday, In the Goods of [1900] P 154 (refd)
Williams v Goude (1828) 1 Hag Ecc 577 (refd)
Wingrove v Wingrove (1885) 11 PD 81 (refd)
Wintle v Nye [1959] 1 WLR 284 (refd)
Woodhouse v Balfour (1887) 13 PD 2 (refd)
Yusof bin Ahmad & Ors v Hongkong Bank (Singapore) Ltd & Ors [1990] 2 MLJ 326 (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)
Contracts Act 1950 ss 10, 13–20
Contract Act 1872 [India] s 16(2)
Evidence Act 1950 ss 3, 60(1), 68, 111, 114(g), 134
Evidence Act s 114(g) [India]
Probate and Administration Act 1959 ss 34, 40
Rules of High Court 1980 O 10 r 8(1), O 80 r2(3)(e)
Trustee Act 1949 ss 40(1), 45(1), (3)
Trustee Act 1925 s 41 [Eng]
Wills Act 1959 ss 2, 5
Wills Act 1837 [Eng] s 9

John Khoo, Ng Poh Tatt, S Theivanthiran and *Richard Huang* (Ismail Khoo & Associates) for the plaintiffs.

KH Koh, Raymond Ooi (Raymond Ooi), Lim Choo Hooi (J Tan & CH Lim) and *Foo Say Keow (Murad & Foo)* for the first to third defendants.
JA Yeoh (Shearn Delamore & Co) for the fourth and fifth defendants.

Cur Adv Vult

Jeffrey Tan J:

Introduction

This has been a trial of some proportions. Sixty seven days were invested recording and hearing evidence and submissions. A catalogue of facts were asserted, a host of issues was raised, literally thousands of folios of documents were produced (see bundles of documents marked PB1, PB2, PB3 and PB4 by the plaintiff, DB1[A]–DB1[F] by the first to third defendants and DB2[A] and DB2[B] by the fourth and fifth defendants) and more than 750 pp of typed notes were recorded. Yet, these proceedings would have been longer even still if not for the agreement of the parties, thankfully, to dispense with all formal proof (save where expressly required, and there were few) of all documents in the bundles of documents and to agree to certain facts (see bundle of all agreed facts).

It has to do with a family dispute on the last will or intestacy, and related issues, of Khaw Bian Cheng (the deceased), the progenitor of the plaintiffs and defendants, and the considerable fortune he left or should have left. The disputes, claims and related issues will be related in the course of this grounds. However, to set the scene,

(i) claiming that the three wills dated 3 August 1992 were forged by the first, second and third defendants and or procured by fraud and undue influence, the plaintiffs propounded three wills dated 24 October 1990 ('1990 wills') as the last will of the deceased,

(ii) denying any forgery, the first, second and third defendants propounded three wills dated 3 August 1992 ('1992 wills') as the last will of the deceased, whilst,

(iii) the fourth and fifth defendants, claiming there are no true wills, propounded the intestacy of the deceased.

The plaintiffs claimed as well for the return or restitution of substantial sums, several cars, jewellery and a piece of land that the first to third defendants allegedly extruded and peculated in the last year of the deceased's life, for the removal of the first, second and third defendants as executors and trustees and for the forfeiture of their beneficial interests under the 1990 or 1992 wills.

Eclectic, the evidence ranged from the genealogy and early years, the properties in Malaysia, Thailand and the United States ('US'), the character and lifestyle, the children and grandchildren, the trials and tribulations with progeny, the bequests, the many 'wills and codicils', the 'settlements and gifts' and dealings of the deceased.

Witnesses

Twenty three witnesses testified at the trial; 12 were summoned by the plaintiffs, eight by the first to third defendants and three by the fourth and fifth defendants. Trial commenced on 22 October 1996 and ended on 25 March 1998.

Testifying for the plaintiffs were Khaw Cheng Bok (PW5), Khaw Cheng Liat (PW9), Hamid Merican (PW1 — a businessman/estate agent and friend of the family), Dr Abdul Gafoor (PW2 — an orthopaedic surgeon), Teoh Say Bee (PW3 — an employee of the deceased for 50 years), Teh Beng Tatt (PW4 — the deceased's accounts clerk for 12 years), Dr Tan Chee Khuan (PW6 — a consultant psychiatrist at Lam Wah Ee Hospital, Penang — 'LWE Hospital'), Dr Francis Tan Seow Kee (PW7 — a consultant physician at LWE Hospital), Teoh Seng Chye (PW8 — the Deputy Branch Manager of Bank Bumiputra (M) Bhd Pulau Tikus Branch — 'BBMB'), Chew Cheng Leong (PW10 — the manager of Arthur Andersen & Co of Kuala Lumpur), Nik Saghir bin Nik Ismail (PW11 — a senior partner of Messrs Nik Saghir & Ismail, Advocates & Solicitors of Kuala Lumpur) and Ghazi bin Ishak (PW12 — a senior partner of Messrs Ghazi & Lim, Advocates & Solicitors of Penang and a witness to the 1990 wills).

Testifying for the first to third defendants were Howard Khaw Teik Chong (DW4), Richard Khaw Teik Ewe (DW5), Lim Cheng Chuan (DW1 — a senior lawyer and a witness to the 1992 wills), Yeoh Keat Chye (DW2 — the driver of the deceased), Tan Beng Hin (DW3 — a broker), Lim Bock Eng (DW6 — Khaw Cheng Poon's wife), ML Isdakorn Kasemsri (DW7 — a lawyer from Bangkok, Thailand) and Cho Choo Meng (DW8 — a chartered accountant and director of Price Waterhouse, Penang). Notably absent from the witness-box was Cheng Poon.

The witnesses for the fourth and fifth defendants were Khaw Cheng Hum, Prateep Pattana-Amorn (DW9 — a lawyer from Songkla, Thailand) and Putian a/l Boncham (DW10 — the interpreter of the court who interpreted DW9's testimony from Thai to English).

The deceased

It is appropriate, since it has to do with the deceased, to begin with a short narrative of the deceased. The deceased, known also as Bian Cheng Naranong, born in Penang in 1905, was the only son of Khaw Joo Chie (also known as Joo Chie Naranong) and Lim Swee Eam. He was the only grandson of Khaw Sim Bee (also known as Sim Bee Naranong) and a great grandson of Khaw Soo Cheang, the founding patriarch of the Khaws of Penang and the Naranongs of Thailand. Khaw Soo Cheang, a veritable *taipan* of the south seas, was an adventurer/entrepreneur *extraordinaire*. He came to Penang, in 1822, a destitute from South China, but soon built an immense business empire spanning 19th century Penang and Siam (as Thailand was called). Khaw Soo Cheang enjoyed the patronage of the Royal House of Siam and had close ties with the aristocracy of Siam. His

sons, Sim Bee was the youngest and arguably the most able, were also men of remarkable gift and enterprise. They fanned out, like the sons of Mayer Amshel of Frankfurt known better by their sobriquet 'Rothschild', and built on their father's empire. In their heyday, they were even governors of many of the southern Thai provinces. Like the Rothschilds before them, they too were bestowed titles of nobility and were members of the (Thai) aristocracy. Indeed, that comparison is apt, as the story of the Khaws/Naranongs of the founding patriarch and his sons was similarly one of wealth and power. Unfortunately, the following generations failed to produce a Khaw/Naranong of the stature of the patriarch or his sons (for further reading on the Khaws/Naranongs, see *Family and State, The Formation of a Sino-Thai Tin-Mining Dynasty 1797–1932* by Jennifer CW Cushman).

The Khaws in this action belong to the Sim Bee branch of the Khaw/Naranong family of Penang and Thailand. Not much is known about Joo Chie, the only son of Sim Bee. Presumably, Joo Chie inherited Sim Bee's wealth and the deceased in turn inherited Joo Chie's inherited wealth.

All parties agreed that the deceased was an educated man fluent in the English language. A *on vivant* who lived off his inheritance, his marriage to Ooi Geen Peen, his only wife, blessed him with five sons (Cheng Hum [fourth defendant], Cheng Bok [first plaintiff], Cheng Poon [first defendant], Cheng Liat [second plaintiff] and Cheng Been [who is mentally unsound]) and two daughters (Liang Imm [third plaintiff] and Beng Imm [the deceased]). Described variously as uxorious:

> ... henpecked, a martinet, strict with his children, parsimonious, careful with money, as good as his word, charitable and generous, the deceased educated and supported his children (except Cheng Hum and Liang Imm) and most of his children's children. He provided them Bannuities and allowances until his last day, on 10 April 1993, at 88, at Mount Elizabeth Hospital, Singapore. The deceased was the sole beneficiary of his wife who died in 1988.

Miseenscene

The *mise en scene* will be complete with the children and grandchildren of the deceased. Liang Imm, the eldest child, was raised by her paternal grandparents. She is the residuary beneficiary of the estate of Lim Swee Eam (Joo Chie's wife and Liang Imm's paternal grandmother). Susie Yeoh Kooi Huah (fourth plaintiff) and Betsy Yeoh Kooi Sim (fifth plaintiff) are Liang Imm's children.

Cheng Hum, the eldest son, lives as he did off his inheritance from his paternal grandparents and some properties from the deceased. Raised by paternal grandparents, he only lived with his parents for five years, when his parents were living with his grandparents. Grace Khaw (fifth defendant) is Cheng Hum's only (adopted) child.

Cheng Bok, the second son, retired at 52 as the Chief Health Inspector of the Johore Bahru City Council. He lived, until five, with his paternal grandparents. Thereafter, he lived with his parents at 20 Pykett Avenue

(Pykett Avenue). At 25, he left for Australia to pursue his studies. He entered public service in 1963. He retired in 1982. He lived his adult life, most of it, in Johore Bahru. Between 1963 to 1972, he was not allowed into Pykett Avenue. He was financially assisted, as were his children, by the deceased. Teik Lim (sixth plaintiff), Gim Hong (seventh plaintiff) and Teik Chye (eighth plaintiff) are Cheng Bok's children.

Cheng Poon, the third son, depended entirely on the deceased. He lived his entire life, even now, at Pykett Avenue with his two sons, Richard Khaw Teik Ewe (second defendant) and Howard Khaw Teik Chong (third defendant), and daughter, Gim Chuan. Richard and Howard were supported and educated at the expense of the deceased. Cheng Poon's wife, Lim Bok Eng, lived away from the family for ten years. After the demise of the deceased's wife with whom she had disagreement, she moved back to Pykett Avenue. Between 1988 to 1993, Cheng Poon, Bok Eng (from 1990/1992), Richard, Howard and Gim Chuan were the only Khaws (and Cheng Been) living with the deceased.

Cheng Liat, the fourth son, had worked as a factory manager. He retired in 1985 at age 52. He lived, until age 15, with his parents. Thence, he was dispatched to the United Kingdom where he lived for ten years. On 19 September 1990, he was adjudged a bankrupt; on 29 July 1997, the receiving order was annulled. Teik Hock, Teik Ghim, Serena Khaw and Desmond Khaw (9th to 12th plaintiffs) are Cheng Liat's children. Sally Khaw is Cheng Liat's first wife.

Cheng Been, the fifth son, is mentally unsound. He is supported by a trust set up by the deceased. Beng Imm, a lawyer, died in 1969.

Evidently, three generations of Khaws of the Sim Bee branch lived for many and many a year off the inherited wealth of the deceased. Yet, the deceased left, leaving a clue of the wealth he inherited, substantial properties in Penang (see P19), Thailand (see PB1[21–27]) and US (see schedule to the 'US will dated 3 August 1992'— P2C). However, on the day he died, in stark contrast to his immovable properties, the deceased left a paltry RM26,926.88, relatively speaking, in his account.

The wills propounded

It is timely to elaborate on the 'wills' that the plaintiffs, and the first to third defendants propounded.

All plaintiffs, through Cheng Bok, propounded three wills dated 24 October 1990 ('1990 wills') as the last will of the deceased. Cheng Poon, Cheng Bok, Richard and Teik Lim (Cheng Poon as the governing trustee) are the executors and trustees in all 1990 wills. The first will dated 24 October 1990 ('1990 Malaysian will') relates to the real and personal property of the deceased in Malaysia; the plaintiffs and defendants (except Grace) are named as the beneficiaries. The second will dated 24 October 1990 ('1990 Thai will') relates to the real and personal property of the deceased in Thailand; Cheng Poon, Cheng Bok, Cheng Liat and Bian Naranong Trust Fund are named as the beneficiaries. The third will dated

A 24 October 1990 ('1990 US will') relates to the real and personal property of the deceased in the US; Cheng Poon, Cheng Bok and Cheng Liat are named as the beneficiaries. The witnesses to the 1990 wills were Ghazi Ishak and Hamid.

The first, second and third defendants conceded that the 1990 wills
B were true wills of the deceased; however, they propounded three wills dated 3 August 1992 ('1992 wills') as the last will of the deceased. Cheng Bok, Cheng Poon and his sons (Cheng Poon as the governing trustee) are the executors and trustees in all 1992 wills. The first will dated 3 August 1992 ('1992 Malaysian will') relates to the real and personal property of the deceased in Malaysia; the plaintiff and defendants (except Grace) are
C named as the beneficiaries. The second will dated 3 August 1992 ('1992 Thai will') relates to the real and personal property of the deceased in Thailand; Cheng Poon, Cheng Bok, Cheng Liat and Bian Cheng Naranong Trust Fund are named as the beneficiaries. The third will dated 3 August 1992 ('1992 US will') relates to the real and personal property of the
D deceased in the US; Cheng Poon, Cheng Bok and Cheng Liat are named as the beneficiaries. The witnesses to the 1992 wills were Lim Cheng Chuan and Dr Abdul Gafoor.

It has already been said that the fourth and fifth defendants propounded the intestacy of the deceased. Nevertheless, all parties agreed that the 1990
E wills, and similarly of the 1992 wills, was a single instrument and that the partition of the 1990 or 1992 wills into several instruments (the Malaysian, Thai and US chapters) should not be a ground or reason to invalidate the 1990 and or 1992 wills.

The proceedings to date

F

Going by the evidence, a few days after the burial of the deceased, Lim Cheng Chuan (DW1) read the 1992 wills to the Khaws present at Pykett Avenue. The following proceedings erupted in quick succession.

On 2 December 1993, vide Penang High Court 32–159–93, Cheng
G Bok, Cheng Poon, Richard and Howard, the executors and trustees in the 1992 Malaysian will, petitioned for probate of the estate of the deceased in Malaysia. On 30 June 1995, Abdul Hamid J directed that O 72 of the Rules of the High Court 1980 shall apply to 32–159–93. Hence, at the stage of submissions before this court, all parties agreed that the outcome of the instant proceedings shall be binding on 32–159–93.

H On 6 September 1994, all 13 plaintiffs instituted action (Penang High Court 22–271–94) against Cheng Poon, Richard and Howard for the following relief:

(a) an injunction restraining Cheng Poon, Richard and Howard 'from applying for and taking out any probate or administration with
I connection with the estate of the deceased in Malaysia, Thailand or America';

(b) an order removing Cheng Poon, Richard and Howard as executors and trustees of the estate of the deceased;

(c) an account by Cheng Poon, Richard and Howard of the lands and estate of the deceased. A

On 31 March 1995, Cheng Bok instituted 22–63–95 against Cheng Poon, Richard and Howard for the following reliefs:

(a) a declaration that the wills of the deceased dated 2 August 1992 concerning his assets in Malaysia, Thailand and America are invalid; B

(b) a declaration that the wills of the deceased dated 24 October 1990 concerning his assets in Malaysia, Thailand and America are valid wills;

(c) a declaration that Cheng Poon, Richard and Howard had infringed the 1990 wills and or the 1992 wills and all rights and/or interest of Cheng Poon, Richard and Howard in the estate of the deceased are forfeited; and C

(d) a declaration that Cheng Poon, Richard and Howard are not qualified to be executors of the deceased. D

The following orders were made in 22–63–95:

(a) on 23 May 1995, on Cheng Bok's application, TS Nathan J granted an ex parte injunction restraining Cheng Poon, Richard and Howard from 'leasing, charging selling disposing or dealing with the assets of the deceased pending the disposal of 22–63–95'; on 30 May 1995, E TS Nathan J granted an inter partes injunction upon similar terms;

(b) on 19 September 1995, on Cheng Bok's application, TS Nathan J appointed Amanah Raya Bhd ('Amanah') as the receivers and managers of the assets and liabilities of the estate of the deceased;

(c) on 8 April 1996, TS Nathan J ordered the consolidation of 22–271–95 and 22–63–95; F

(d) on 26 September 1996, on Cheng Hum and Grace Khaw's application (encl 87), this court granted leave to Cheng Hum and Grace Khaw to be added as the fourth and fifth defendants;

(e) on 22 October 1996, this court directed that the consolidated action (22–271–95 and 22–63–95) be intituled as appearing in the first page of the instant judgment; and, G

(f) leave for the amendments to the instant pleadings.

(Note: there was and there is no appeal against any of the aforesaid orders.) H

On 6 December 1995, Cheng Bok commenced action (Penang High Court 22–299–95), on behalf of the estate, against Cheng Poon and Richard for the following orders:

(a) a declaration that cars purchased in the names of Cheng Poon and Richard are held by them for the deceased; I

(b) a declaration that the transfer of lands known as Holding Nos 6767 and 678, Mukim 2, Daerah Barat Daya, Penang ('the Teluk Bahang land') by the deceased to the Cheng Poon is invalid;

(c) a declaration that the Teluk Bahang land is held for the deceased;

(d) an account of moneys from the disposal of the said cars;

(e) an account of all moneys in the joint account of the deceased and Cheng Poon;

(f) an account of all moneys transferred from the deceased's account to Cheng Poon's account and/or Cheng Poon's account with his wife and/or members of his family or withdrawn from the deceased's account for their benefit;

(g) an order compelling Cheng Poon to return all moneys taken out which cannot be justified with valid documents;

(h) an order compelling Cheng Poon to return monies amounting to RM826,000 to Cheng Bok and RM866,000 to Cheng Liat;

(i) injunctions against dealing with the cars and the Teluk Bahang land;

(j) general damages;

(k) exemplary damages; and

(i) interest and costs.

About a year before any one of the above proceedings were instituted, Cheng Bok, Cheng Liat, Richard (all on 20 October 1993) and Howard (on 1 December 1993) executed *An Agreement of the Beneficiaries of the will of Khaw Bian Cheng for Independent Administration and for Administration without Bond* (see DB1[1–2]). By their solicitors' letter dated 6 April 1994, Cheng Bok and Cheng Liat notified one Charles Lebeau that they were immediately withdrawing their consent under the *Agreement of the Beneficiaries of the will Of Khaw Bian Cheng for Independent Administration and for Administration without Bond.* Nonetheless, Howard petitioned the Superior Court for the State of Arizona (vide Petition No P 24426), on 25 July 1994, for probate of the 1992 US will and for his appointment as personal representative of the deceased's estate in Arizona; on 16 September 1994, Howard was appointed the personal representative of the deceased's estate in Arizona. On 18 October 1994, the 1992 US will was 'admitted to Formal Probate' by the Superior Court for the State of Arizona (see DB1[82]). On 27 January 1995, Howard was appointed 'ancillary' personal representative of the Florida estate of the deceased (see DB1[82]).

With regard to the Thai estate, the deceased died possessed of numerous landed properties in Kantang, Thailand; specifically, the deceased held $^{146}/_{147}$ properties in his own name or through a Thai corporate — Bian Cheng, Wife, Relatives and Friends Ltd — in which he held 10,000 of a total of 12,000 shares.

Trial of the consolidated action (22–271–95 and 22–63–95) intituled 22–63–95 commenced on 22 October 1996. After trial commenced, Cheng Bok applied, on 14 December 1996 vide 22–299–95 (encl 4), for 22–299—95 to be consolidated with the consolidated action (22–271–95 and 22–63–95). There were no objections from the parties in 22–299–95 or the parties in the consolidated action (22–271–95 and 22–63–95) to that consolidation. Felicitously, through their counsel, Cheng Bok, Cheng

Poon and Richard, the immediate parties in 22–299–95, agreed with regard to proof of the claim and defence in 22–299–95 to rely on the evidence adduced in the instant trial from 22 October 1996. Accordingly, it was ordered on 6 May 1997, with the consent of all parties, that 22–299–95 be consolidated with the consolidated action (22–271–95 and 22–63-95) and that all consolidated causes and matters be tried at the same time, that is, in the instant trial.

The litigants are divided, albeit consanguity, into three fractious camps. All 13 plaintiffs, through Cheng Bok, propounded the 1990 wills and impugned the 1992 wills. They sought: (i) an injunction restraining Cheng Poon, Richard and Howard 'from applying for and taking out any probate or administration (with) connection with the estate of the deceased in Malaysia, Thailand or America', (ii) an order removing Cheng Poon, Richard and Howard as executors and trustees of the estate of the deceased, (iii) an account from Cheng Poon, Richard and Howard of the lands and estate of the deceased, (iv) a declaration that Cheng Poon, Richard and Howard infringed the 1990 wills and or the 1992 wills and that all rights and/or interest of Cheng Poon, Richard and Howard in the estate of the deceased are forfeited, and, (v) a further declaration that Cheng Poon, Richard and Howard are not qualified to be executors of the deceased.

Cheng Bok also sought, on behalf of the estate, (vi) a declaration that all cars purchased in the names of Cheng Poon and Richard were held by them for the deceased, (vii) a declaration that the transfer of lands known as Holding Nos 676 and 678, Mukim 2, Daerah Barat Daya, Penang ('the Teluk Bahang land') by the deceased to the Cheng Poon is invalid, (viii) a declaration that the Teluk Bahang land was held for the deceased, (ix) Cheng Poon and Richard's account of the monies received from their disposal of the said cars, (x) Cheng Poon and Richard's account of all monies in the joint account of Cheng Poon and the deceased, (xi) Cheng Poon and Richard's account of all monies transferred from the deceased to Cheng Poon's account and/or to Cheng Poon's account with his wife and/or the members of his family and or withdrawn from the deceased's account for their benefit, (xii) an order that Cheng Poon do return all monies which could be justified with valid documents, (xiii) an order that Cheng Poon do 'return' RM826,000 to Cheng Bok and RM866,000 to Cheng Liat, (xiv) injunctions restraining Cheng Poon and Richard from dealing with the cars and the Teluk Bahang land, (xv) general damages, (xvi) exemplary damages, and, (xvii) interest and costs.

Cheng Poon, Richard and Howard, the 'real defendants', propounded the 1992 wills as the last will of the deceased. They denied the charges of misdeeds and pleaded that the said cars, monies and Teluk Bahang land were gifts from the deceased.

The last camp, Cheng Hum and Grace Khaw, propounded the intestacy of the deceased. They asserted, in pleading and in Cheng Hum's oral testimony, that the deceased, after the demise of his wife in 1988, was not of a sound disposing mind, and that the 1990 and 1992 wills were not true wills of the deceased.

The salient evidence

As imparted, or was it forewarned, more than 750 pp of typed notes were recorded. Perhaps, the key to follow that copious body of evidence should be a brief outline of the salient evidence.

After the death of his wife, the deceased who had prior wills, executed a deed of settlement dated 2 March 1989 ('1989 deed') — [DB1(A)(89–94)]. That 1989 deed was not implemented; apparently, Cheng Liat complained that the 1989 deed favoured Cheng Poon but and was not fair to him and Cheng Bok and that the deceased was advised that the 1989 deed favoured Cheng Poon. About a year later, on 2 March 1990, at E & O Hotel, Penang, the deceased executed a codicil prepared by Nik Saghir. In the same year, on 24 October 1990, the deceased executed the 1990 wills. In June 1991, the deceased sold the Batu Ferringhi land for RM7,501,032; apparently, individual sums of RM866,000 was promised to Cheng Poon, Cheng Bok and Cheng Liat. In June 1992, the deceased received the balance purchase price (RM6.3m) from the sale of the Batu Ferringhi land; RM866,000 was paid to Cheng Poon. However, Cheng Bok and Cheng Liat were not given their shares; they were given deeds dated the 24 July 1992 ('the 24 July 1992 deeds') in lieu of their respective RM866,000. Meanwhile, between June to July 1992, the said RM6.3m had been disbursed, mostly to Cheng Poon and his family. On 13 July 1992, the deceased who suffered a stroke was admitted to LWE Hospital. On 17 July 1992, the deceased was discharged from LWE Hospital. On 3 August 1992, at Pykett Avenue, according to the proponents of the 1992 wills, the deceased executed the 1992 wills and transferred the Teluk Bahang land to Cheng Poon.

With regard to the 1992 wills, it was said that Lim, Dr Gafoor and Howard at the very least were present when the 1992 wills were signed; both attesting witnesses (Lim and Dr Gafoor) testified that they, present at the same time, witnessed the deceased signing his will/s, at Pykett Avenue on 3 August 1992. Those wills were not bound. Both attesting witnesses testified that they subscribed the wills signed by the deceased on 3 August 1992 in the presence of the deceased and in the presence of each other. Lim identified the 1992 wills as the wills he subscribed on 3 August 1992. Dr Gafoor was less categorical — 'the loose sheets that I signed on 3 August 1992 appear to be those (in the 1992 wills)'. Both attesting witnesses identified their signatures on the 1992 wills. Howard testified that the deceased amended the 1990 wills and he prepared the 1992 wills (there were no carbon or other duplicate copies) according to the amendments made to the 1990 wills. According to Lim, he took possession of the 1992 wills, duly signed and subscribed, that is, three documents in all, when he left Pykett Avenue on 3 August 1992. In examination-in-chief, Lim testified most unequivocally that the 1992 wills had not left him; he testified that the 1992 wills were always in his office, under lock and key.

Beng Tatt testified, however, that Richard instructed him, on 12 August 1992, to collect some documents from Lim for the deceased and Dr Gafoor's

signatures, and that Lim handed him loose sheets of documents for the deceased and Dr Gafoor's signatures. According to Beng Tatt, the deceased signed those loose sheets at Pykett Avenue and Dr Gafoor signed those loose sheets at his clinic. In both cases, so Beng Tatt testified, the deceased and Dr Gafoor signed those loose sheets in his presence and of no other.

Beng Tatt further testified that Lim handed him a stack of documents at Pykett Avenue on 26 August 1992, for the deceased and Dr Gafoor's signatures. The deceased signed that stack of documents in his and Lim's presence. Lim instructed him, after the deceased signed that stack of documents, to take that stack of documents to Dr Gafoor for his signature. On 28 August 1992, as Dr Gafoor was on holiday, he returned that stack of documents to Lim. On 4 September 1992, Lim again handed him that stack of documents; Lim instructed him to have those documents signed by Dr Gafoor. On 4 September 1992, Dr Gafoor signed that stack of documents at his clinic. And the testimony of Dr Gafoor was that Beng Tatt handed him, on 12 August 1992 and 14 September 1992, loose sheets of a will with the signatures of the deceased and Lim and that he signed those loose sheets and affixed his rubber stamp without the presence of the deceased or Lim. Dr Gafoor testified that the 1992 wills, because of the 'amendments', were not the wills he subscribed on 3 August 1992.

Lim Cheng Chuan denied however that he handed loose sheets of the 1992 wills to Beng Tatt or that he instructed Beng Tatt to have loose sheets signed by the deceased and Dr Gafoor. He maintained that the 1992 wills were always in his possession. He denied all knowledge of the execution of loose sheets of the 1992 wills after 3 August 1992. However, he admitted that he handed the 1992 wills to Beng Tatt and instructed Beng Tatt to have the 1992 wills affixed with Dr Gafoor's rubber stamp.

In the course of this grounds, there will be a detailed discussion and more of the evidence on the 1992 wills. However, it should be promptly pointed out that a second 1992 Thai will dated 3 August 1992 (D2D), whereas there should be none, was produced during the trial, and that second 1992 Thai will was vehemently denied and disavowed by Lim who only admitted it was bearing his signature when he was confronted by the production of the second 1992 Thai will.

With regard to the 1990 wills, there was no challenge, unlike the 1992 wills, that those wills were not executed in manner prescribed by the Wills Act 1959. Both subscribers (Ghazi Ishak and Hamid) testified that they, present at the same time, witnessed the deceased signing his will/s in the chambers of Messrs Presgrave & Mathews, Advocates and Solicitors of Penang on 24 October 1990, and that they subscribed the wills signed by the deceased on 24 October 1990 in the presence of the deceased and in the presence of each other. Both Ghazi Ishak and Hamid identified the 1990 wills as the wills they subscribed on 24 October 1990.

Essentially, the 'expert' evidence on the mental/medical state of the deceased rest on the testimony of Dr Tan Chee Khuan ('Dr Tan') and Dr Francis Tan Seow Kee ('Dr Francis'). Dr Tan testified that he assessed the mental state of the deceased on 16 March 1990, 24 October 1990,

24 July 1992, 3 August 1992, 27 January 1993 (the dates are pertinent) and that on all five occasions he found the deceased to be of 'sound disposing mind'. Dr Tan also testified that Cheng Been is suffering from chronic schizophrenia.

Dr Francis testified that the deceased was referred to him, on 12 July 1992, by a general medical practitioner who advised that the deceased had suffered series of seizures. He narrowed the cause to three possible causes: (i) a mild stroke, (ii) the medication the deceased was taking, and, (iii) the blood chemistry of the deceased. The deceased, admitted on 12 July 1992, was discharged from LWE Hospital on 17 July 1992. There was a lacuna infarct on the left side of the brain of the deceased. There were periods, at LWE Hospital, when the deceased was slightly confused. The deceased requested, on 17 July 1992, to be discharged. The condition of the deceased, when he saw him next, on 22 July 1992, was stable. The deceased was clear and lucid on 22 July 1992.

Hamid Merican, Teoh Say Bee and Teh Bent Tatt

The other witnesses, apart from kin, who testified on the mental/medical condition of the deceased were Hamid, Say Bee and Beng Tatt.

Md Hamid Merican bin Abdul Kader Merican, 50, a businessman and an estate agent, testified that he had known the deceased for more than 30 years. 'I was assisting him in his financial matters and in the management of his properties. I regard myself as his personal friend ... I was acquainted with his financial matters. The deceased consulted me from time to time.'

Cheng Poon, Richard and Howard lived with the deceased. Until 1988, Bok Eng was not living at Pykett Avenue. The deceased's wife told him that Bok Eng was not a good woman and was not allowed into Pykett Avenue.

The deceased asked him if the 1989 deed would give his entire estate/property to Cheng Poon. He advised the deceased to take legal advice; he recommended Saghir Md Noor. In Singapore, the deceased, Cheng Bok, Cheng Poon and Cheng Liat discussed the 1989 deed. The sons were arguing for the division of their father's properties. The deceased was present when his sons came to their agreement.

Further to that meeting in Singapore, he, the deceased and Lim met at Nik Saghir's office. The 1989 deed was discussed. Nik Saghir confirmed that Cheng Poon would have the entire estate. The deceased instructed Nik Saghir to prepare a will or codicil.

Sometime in 1990, he was with the deceased at the E & O Hotel, Penang. Nik Saghir, Cheng Bok, Cheng Poon and Cheng Liat were also present. Nik Saghir handed a draft will or codicil to the deceased. He heard that the said will/codicil would give equal shares to Cheng Bok, Cheng Poon and Cheng Liat, except that Cheng Poon would have a 40% share of a property in Thailand while the other two sons would have a 30% share each. The three sons were appointed executors and trustees with

Cheng Poon as the governing trustee. The deceased executed that codicil in the presence of Nik Saghir and Lim. When the codicil was signed, he was not in the room.

On 24 October 1990, at Messrs Presgrave & Mathews of Penang, the deceased executed the 1990 wills in the presence of Ghazi Ishak and himself.

In July 1992, he visited the deceased at LWE Hospital. The deceased could not recognize him. He greeted the deceased, but the deceased did not respond. One evening, whilst the deceased was still in LWE hospital, Richard, Howard and a lady paid him a visit. Richard or Howard asked, 'can you do something about the wills?' He replied, 'Please don't touch it'. After the deceased was discharged from LWE Hospital, En Ismail — Nik Saghir's partner — informed him that someone was asking for a copy of the March 1990 will/codicil and for one other document.

He paid three visits to the deceased after he (the deceased) was discharged. On the first visit, he was told that the deceased was sleeping. On the second visit, he was told that the deceased was in the toilet. On the third visit, he saw the deceased holding a set of English newspapers. He greeted the deceased, but he (the deceased) did not respond. He said, 'Uncle, I am going back'. The deceased did not respond.

From what he knew, from years of contact, the deceased was very careful with money. He (the deceased) would only spend if there was reason. Several times the deceased said that he was having a cash problem and that he wanted to dispose off his properties or obtain a loan. It was impossible that the deceased would spend RM5m within a period of five months.

Sometime in 1986, the deceased's wife told him that she would give Cheng Bok, Cheng Poon and Cheng Liat each 15% of the sales proceeds from the sale of her lands — Lots 92, 93, 110, Mukim 17, Batu Ferringhi, Penang ('the Batu Ferringhi land'). The deceased told him that he (the deceased) would carry out her wish. The deceased sold the Batu Ferringhi land and gave RM1m to Cheng Poon.

Two days before the deceased died, he telephoned Pykett Avenue. Cheng Poon informed him that the deceased was unconscious. He could hear Bok Eng's voice in the background telling Cheng Poon not to tell him the state of the deceased.

The deceased had several cars in the names of Cheng Poon and Richard. The deceased told him that Cheng Poon and Richard were holding the cars for Cheng Bok, Cheng Liat and Cheng Poon. The deceased informed him that Cheng Hum was bypassed as his mother (Lim Swee Eam) had given Cheng Hum substantial properties and that Cheng Hum had no issue.

He attended the deceased's funeral. A lorry arrived with the body of the deceased in a coffin. The coffin was not taken into the house or house compound. The deceased's wife had a grand funeral. For many days, her body was lying in state in the house. In the case of the deceased, the lorry

with the coffin departed for the cemetery after a few hours outside the house. The funeral for the deceased was rather bare.

Under cross-examination by Mr Koh, Hamid testified that he knew the deceased well. A few years before the death of the deceased, he traveled with the deceased to Kuala Lumpur, Singapore, Thailand and London. From 7 June 1990 to 13 June 1990, he was in Bangkok with the deceased. On 21 June 1990, he was in the United Kingdom. After he arrived, he met the deceased.

Sometimes, the deceased discussed his finances with him. He helped the deceased to obtain an overdraft of RM1.5m from the BBMB; the Teluk Bahang land was charged as security.

The deceased had more properties than the five properties in PB1(77). The deceased had plans to develop Pykett Avenue. He (the deceased) was contemplating a hotel on Pykett Avenue. Despite attempts, he could not contact the architect — Dayabina Architect Sdn Bhd — to prepare the proposed development plans.

Hamid said he was not aware of the 24 July 1992 deeds. However, he did convey the deceased's message to Cheng Liat that a sum of RM900,000 (thereabout) was due to him (Cheng Liat) from the sale of the Batu Ferringhi land and that the deceased intended to defer payment and pay him (Cheng Liat) interests instead.

Mr Koh: I put it to you ... Richard and Howard never came to your house and asked you to do something to the will.

Hamid: They came and asked me to do something to the will. I told them not to touch the will.

The deceased was careful with his money. However, a few months before he died, after receiving the sale proceeds from the Batu Ferringhi land, a lot of monies left his (the deceased) account.

After the deceased was discharged from the LWE hospital, he received a note that someone from the deceased's office telephoned and asked for a copy of the deceased's (1990) wills. He delivered a copy of the 1990 wills to Pykett Avenue. The deceased was upstairs reading newspapers. He greeted the deceased, but the deceased did not respond.

Once, after his third visit, he telephoned Pykett Avenue. Cheng Poon told him that the deceased was unconscious in Singapore. In the background, was a woman's voice saying in Hokkien, 'not to inform him'.

The deceased was a careful man. The deceased kept his accounts accurately. From April 1992, he was not seeing the deceased frequently; the deceased seldom called and he was seeing him less frequently.

Mr Koh: I put it to you ... you were friendly with the deceased up till July 1992.

Hamid: That is your version. It is not true.

Hamid said that he would not know if the deceased, after July 1992, was unhappy with him. 'I remember that I met the deceased in July/August 1992 in the airport lounge. The deceased was returning from China. I said

hello to him. I remember that the deceased said to me in April 1992 that he would pay interest to the first and second plaintiffs.' A

Mr Koh: I put it to you that it was in June 1992.

Hamid: I can't recall, it could be April or June.

The Batu Ferringhi land was sold for RM7,501,032. He calculated the RM866,000 paid to Cheng Poon. In April or June 1992, the deceased said to him that he had no money to pay 45% of the Batu Ferringhi sale proceeds to his three sons. Tan Beng Seng or Tang Beng Brothers secured the buyer for the Batu Ferringhi land. He was informed that they were paid a commission. He was paid a 2% seller's commission. B

Under cross-examination by Mr Yeoh, Hamid testified that the deceased was very close to his wife. He (the deceased) was very upset by her death; his health declined but it recovered. C

He enjoyed the trust and confidence of the deceased; the deceased turned to him for advice on financial matters and on his relationship with his sons; the deceased consulted him on his wills and assets. He was not involved in the preparation of the 1989 deed. After it was executed, the deceased told him that he (the deceased) had instructed Lim, sometime before Christmas 1989, to transfer his assets to the trust under the 1989 deed. The deceased asked him and he (Hamid) expressed his opinion that the 1989 deed would give the entire estate to Cheng Poon. He advised the deceased to take legal advice. The deceased was so upset by the 1989 deed that he chased Cheng Poon, calling Cheng Poon 'celaka', out of the house. Beng Tatt was present. He (Hamid) pacified the deceased. After a few days, the deceased and Cheng Poon reconciled. D E

Sometime after the trip to Singapore in 1989, Cheng Liat was ordered out from the house. The deceased told him that Cheng Poon had said to him (the deceased) that Cheng Liat was poisoning the cup he (the deceased) was using to take his medicine. He advised the deceased to verify the facts and to make up with Cheng Liat. But they (the deceased and Cheng Liat) did not reconcile. F

There were two trips to Singapore. Both meetings at Singapore were initiated by the deceased. Cheng Liat and Cheng Poon followed the deceased to Singapore. The deceased summoned Cheng Bok who was then in Johore Bahru to Singapore. The three sons discussed the 1989 deed. Cheng Liat said to Cheng Bok that Cheng Poon was swallowing the whole estate and that they (Cheng Liat and Cheng Bok) 'will get telor'. Cheng Bok scolded Cheng Liat and asked for the document. The deceased who was in his own room when his sons were arguing did not know of his sons' argument. G H

Sometime in early January 1990, the deceased, Lim, Nik Saghir and himself met at Nik Saghir's office. Cheng Liat, Cheng Bok and Cheng Poon remained outside. The 1989 deed was the only document that was discussed. Lim briefed Nik Saghir. He (Hamid) did not say anything. Nik Saghir confirmed that the 1989 deed would give the entire estate to Cheng Poon. The deceased instructed Nik Saghir to prepare a new will or codicil. I

A The three sons did not ask him of the outcome of that meeting with Nik Saghir.

Sometime in March 1990, there was a meeting at E & O Hotel, Penang, to prepare a will or codicil. Present were Nik Saghir, the deceased, Lim and himself. When he was in the room, a will or codicil was discussed.
B Later, Lim informed him that the deceased had executed a codicil or will. He (Hamid) had not seen the documents executed at E & O Hotel.

He accompanied the deceased to Dr Tan Chee Khuan's clinic on three or four occasions. Say Bee or Beng Tatt arranged those visits. Sometimes, Cheng Poon, Say Bee or Beng Tatt were also present. Dr Tan Chee Khuan certified that the deceased was of sound mind.
C

On 24 October 1990, he witnessed the execution of the 1990 wills. The deceased instructed him to prepare the 1990 wills. No one else instructed him on the preparation of the 1990 wills. He forwarded the draft 1990 wills to Ghazi Ishak for perusal. Ghazi Ishak read and explained the draft 1990 wills, when the deceased called upon him, to the deceased.
D The deceased asked him to witness the 1990 will. On 24 October 1990, the deceased executed three wills in their (Ghazi Ishak and Hamid) presence. He (Hamid) had no knowledge that the deceased had called upon Dr Tan on 24 October 1990.

Mr Yeoh: I put it to you ... En Ghazi never read the 24 October 1990 wills
E to the deceased when it was executed.

Hamid: He read the wills.

Hamid said that the 1990 wills were not in accord with the three sons' agreement in Singapore. After the 1990 wills were executed, Ghazi Ishak gave a copy of each of the 1990 wills to the deceased.

F The deceased was a careful and sound man when he executed the 1990 wills. He (the deceased) perused the 1990 wills. The deceased told him that he (the deceased) was leaving out Cheng Hum as Lim Swee Eam had given him (Cheng Hum) substantial properties. The deceased also told him that Lim Swee Eam had given sufficient properties to Liang Imm.
G He did not know why Liang Imm was given 17% in Khaw Bian Cheng Sdn Bhd while Cheng Hum was not.

Except for the 1990 wills, the deceased paid him for his services. He secured an overdraft of RM1.5m from BBMB for the deceased. He received RM21,000 or RM25,000 as his fees.

H By an agreement dated 12 December 1987, the deceased and Cheng Hum sold a portion of the land they jointly owned — Holdings 10, 11(1), 12 Mukim 14, NE District, Penang. Cheng Hum made some payments to Cheng Poon or Cheng Liat, but he was not sure if the deceased had insisted on those payments. He was not aware that Cheng Hum was reluctant to sell that land. The deceased wanted to sell those
I properties as he (the deceased) wanted that money. Cheng Liat and Cheng Poon did not push for that sale. He could not recall whether he and Cheng Liat were at Cheng Hum's house to collect Cheng Hum's cheque for RM80,000; but he did not receive a share of that RM80,000.

Mr Yeoh: Would you say that the deceased was a strict and careful man when he executed the 24 October 1990 wills? A

Hamid: The deceased was a strict and careful man.

Cheng Hum and the deceased instructed him to prepare 2(A)(13). He did not know that the deceased had threatened, unless Cheng Hum executed DB2(A)(13), to disown Cheng Hum or that Cheng Hum signed B DB2(A)(13) at the insistence of the deceased and Cheng Poon. He received RM21,000 (not RM70,000) as his commission from Cheng Hum. He was informed that sale was aborted. He believed that more than the 10% deposit was refunded to the purchaser. He did not know if Cheng Hum had asked the deceased for assistance to refund the deposit. He did not refund the commission paid to him. C

When the 1990 wills were being prepared, he reminded the deceased of his (the deceased) previous codicils or wills. He (Hamid) asked for a copy of the will/codicil prepared by Nik Saghir. The deceased said that it was with Lim, but he made no attempt to obtain a copy of that will/codicil from Lim. D

In re-examination, Hamid testified that the deceased asked him to go to America to secure a purchaser for the Benson land. In July 1992, the deceased was absent-minded; at times he had a vivid memory while at times, he had lapses of memory. After July 1992, the mind of the deceased was not stable. As such, he visited the deceased less frequently. Even prior E to July 1992, the mind of the deceased was already not stable.

During the meeting at Nik Saghir's office, Lim explained the provisions of the 1989 deed to Nik Saghir, the deceased and himself. The deceased discussed the 1990 wills with him on a number of occasions.

After the sale of the Ayer Itam land was aborted, he was not aware of F any further dispute. When the deceased executed the 1990 wills, he was strict, careful and of sound mind. He had never seen the will/codicil Nik Saghir prepared.

In further re-examination, Hamid testified that in April 1990 the deceased gave him a copy of Tri-Am International Inc's offer of US$1.6m G for the Benson land — D12. The deceased rejected that offer but instructed him to secure a sale for more than US$2m. Cheng Poon was aware of that offer from Tri-Am International Inc.

The deceased purchased a Rolls Royce and registered it in Cheng Poon's name. Richard who arranged the purchase told him that he received a commission from the seller. Several times, Cheng Poon instructed him H to prepare a transfer of the Teluk Bahang land to himself (Cheng Poon). He did not do so.

Under further cross-examination by Mr Koh, Hamid testified that he could know if the true value of the Benson land was US$1.6m. In June 1990, in relation to the Benson land, he and Cheng Poon flew from London I to the States. The deceased remained in London with a woman and Cheng Liat. He visited the Benson land with Cheng Poon. Richard received RM135,000 as commission from the purchase of the Rolls Royce.

Mr Koh: I put it to you ... Cheng Poon did not instruct you to transfer the Teluk Bahang land to himself.

Hamid: I maintain ... Cheng Poon instructed me to transfer the Teluk Bahang land to himself ... .

He tried to sell the Teluk Bahang land for the deceased. He negotiated with a prospective purchaser.

Mr Koh: I put it to you ... the defendants were trying to discharge the Teluk Bahang land from BBMB and that Cheng Poon did not ask you to arrange the transfer of the said land to himself.'

Hamid: I do not agree. Cheng Poon asked me to transfer the land onto himself.

Mr Koh: I put it to you ... you refused to hand to Cheng Poon whatever documents pertaining to the tentative sale of the Teluk Bahang land and Howard had to call En Ismail of Nik Saghir to try and obtain from En Ismail the documents relating to the tentative sale.

Hamid: Yes, I can agree that Howard contacted the said Ismail to obtain the proposed documents.

Under further cross-examination by Mr Yeoh, Hamid testified that he did not know why the deceased did not accompany him to visit the Benson land. It was the idea of the deceased to sell the Benson land and that he and Cheng Poon should go to the States.

Teoh Say Bee, 68, testified that he had worked for the deceased for 50 years. He is presently employed by the estate of the deceased. His duty was to collect rents from the properties of the deceased, purchase the personal things of the deceased and read letters to the deceased. The deceased dictated and he typed the replies. 'For some 30 years, I was reading letters to the deceased and writing his replies. In one week there would be about three to four letters to be read to the deceased and three to four letters to reply.'

The wife of the deceased died in 1988. In 1990, the deceased was healthy; he was reading the deceased's letters to the deceased and writing his replies. In 1991, he was still reading the deceased's letters to the deceased and the deceased was still replying his letters. In 1992, roughly from January, the deceased was not registering the letters read to him and not instructing him to reply his letters.

Prior to the death of the wife of the deceased, and for ten years, Bok Eng was not living at Pykett Avenue. During that time, Cheng Poon and her children stayed on at Pykett Avenue. Bok Eng and the wife of the deceased were not on good terms. After the demise of the wife of the deceased, Bok Eng moved back to Pykett Avenue.

In July 1992, Bok Eng informed him that the deceased was admitted to LWE Hospital. He was instructed to take care of the deceased. He stayed at the LWE Hospital for about five to six days. On the first day, the deceased woke up at about 11am. 'His body was still ... something like in fits. It was happening once every half an hour. He could not speak to me.'

During those five to six days, he was constantly with the deceased; he slept in the deceased's room. On the second day, the deceased was hallucinating — the deceased said that a lot of people were walking in a picture on the wall. The deceased asked how much was his driver's salary and whether his driver had a house. The deceased said he wanted to give a big house and RM5,000 to his driver. The deceased said he wanted to give him (Say Bee) and Beng Tatt RM5m each.

Before the deceased was admitted to LWE Hospital, he was urinating blood. After the deceased was discharged, he could not express himself. The deceased was forgetful. 'For example, he would ask for roast chicken and when I gave him roast chicken, he would say he wanted chicken chops. He would ask for 'kuih' and when I gave him 'kuih' he would say that he wanted 'kuih talam'. The deceased could not dress himself. He had to dress and undress the deceased.

After the deceased was discharged from LWE Hospital, he was not reading; he was starring at the newspapers. The deceased could not understand what was read to him. The deceased would not respond. The deceased, during the 50 years that he worked for him, was a frugal and careful man. After he was discharged in July 1992, the deceased gave money to whoever asked of him.

Prior to 1992, the deceased signed the rental receipts. After January 1992, the deceased was still signing the rental receipts but his signatures, sometimes, were incomplete. After January 1992, the signatures of the deceased were full of mistakes. He had to rewrite the receipts. He did not know if the deceased was aware he was signing rental receipts but he informed the deceased he was signing rental receipts. When he presented rental receipts for signature, the deceased signed without question. In a month, the deceased had to sign 40 rental receipts. There would be five to six mistakes in those 40 receipts.

In the afternoon, on 3 August 1992, he was at Penang Hill. The deceased had asked him to be at his bungalow (Fairmount). The deceased reached the bungalow at 7pm; two Thai ladies in their 20's were accompanying the deceased. The driver was there. four persons carried the deceased in a sedan chair to the bungalow. The deceased, when he reached the bungalow, looked physically normal but was quiet. When he was healthy, the deceased visited his bungalow about two to three times a year.

In the morning of 3 August 1992, the deceased was in the house; later, he was not in the house. He did not know where the deceased went and with whom. At the bungalow, he asked the deceased what he wanted to eat. The deceased said, 'curry and bread'. He had no further conversation with the deceased. On the night of 3 August 1992, one of those two Thai ladies passed the night in the deceased's room. Those two Thai ladies, Cheng Poon procured them, were supporting the deceased as he was moving about the bungalow. The next morning, at 10am the entire party descended from Penang Hill. Bok Eng operates a stained glass factory — 'Glashaus' — at Pykett Avenue.

A Under cross-examination by Mr Koh, Say Bee testified that he kept records of the rentals collected and the daily expenses. Other than letters, he did not read other documents to the deceased. 'Before his death, the deceased practised on a piece of paper before he signed a document. Before that he was normal.' After the deceased was discharged from the B LWE Hospital, he (Say Bee) received a bonus. The deceased was senile.

In 1993, he accompanied the deceased to temples, dentists and tailors. The deceased said to him that he wanted to go to those places. In 1993, the deceased asked him to buy lottery tickets.

Under cross-examination by Mr Yeoh, Say Bee testified that the C deceased was very close to his wife. However, he did not know if the deceased consulted his wife on family matters. Before 1988, the deceased was fine; the deceased had palpitation of the heart; the deceased was only hospitalised for medical check-ups. The deceased was very sad when his wife passed away. After two or three months, 'he was normal again. He D was looking happy. He was healthy.'

Before her death, the wife of the deceased ran the household whilst the deceased instructed him on financial matters. After her death, Cheng Poon was giving instructions on financial matters of the deceased as Cheng Poon was close to the deceased.

E For 30 years, he read the deceased's letters to the deceased. The deceased could read but he wanted him (Say Bee) to read to him. There were occasions when the deceased would read his letters. Beginning the end of 1991, the deceased was forgetful and could not express himself. In 1992, the deceased seem not to be registering what he had read to him; sometimes, the deceased would ask what he had read to him.

F Mr Yeoh: Upon what basis ... you are so sure it was December 1991?

Say Bee: I just know it was December 1991.

In re-examination, Say Bee testified that the deceased, when he accompanied him to temples, dentists and tailors, did not talk much. During those trips, the deceased was quite forgetful. At the temple, he had to ask the deceased G if he wanted joss-sticks. Before 1992, the deceased would ask him for joss-sticks. In 1992, the deceased would be sitting quietly if he did not prompt him to pray. At the end of 1991, he noticed that the deceased was getting more and more forgetful. In 1992, on many occasions, the deceased asked for masseur service. In 1992, he did not see the deceased reading his H letters. In 1992, when he read the deceased's letters to the deceased, the deceased would be quiet. In 1991, he read all letters to the deceased. The deceased was not reading on his own. In 1991, sometimes the deceased would dictate his replies, but sometimes he would not.

Under further cross-examination by Mr Koh, Say Bee testified that I the deceased said to him the matters set out in para 3 of B1(B)(17 — that the Teluk Bahang was intended for Cheng Bok, Cheng Liat and Cheng Poon. 'That was said to me whilst I was with the deceased in Singapore in 1993. He was still senile but that was what he said to me.'

Mr Koh: I have to put it to you that para 3 of B1(B)(17) never happened.

Say Bee: I disagree. He did say to me such things. The deceased also told me the subject in B1(B)(17) para 4.

Mr Koh: Since the deceased said all that to you he was of sound mind?

Say Bee: I don't agree he was of sound mind but he said that to me.

Mr Koh: I put it to you that B1(B)(17) para 4 never happened as he did borrow money in his own name even after he was more than 80 years old.

Say Bee: He did tell me the things in B1(B)(17) para 4.

Mr Koh: I put it to you ... the deceased would not have discussed those matters with you.

Say Bee: He did say all those things to me.

Teh Beng Tatt, 44, a clerk of the estate of the deceased and of Khaw Bian Cheng Sdn Bhd, testified that he started working for the deceased as a book keeper and finance clerk in December 1979.

The deceased was angry with Cheng Poon as the 1989 deed would give all his property to Cheng Poon. The deceased did not want that deed.

In July 1992, after he was discharged, the deceased became very quiet and his memory became worse — he could not remember things well. Sometimes, he could not continue with his signature of his cheques. In July and August 1992, the deceased's memory was very bad.

On 1 August 1992, when he reached home, he was informed that someone from his office telephoned and asked him to be at the office at 6.30pm. At 6.30pm, at Pykett Avenue, the deceased was having his dinner. He waited in the office. Saying he wanted to see if Hamid was in the will, Howard asked him for the safe keys. He told Howard that he must wait for the deceased. Richard brought the deceased to the office and Howard asked the deceased to instruct him to hand over the safe keys. The deceased was quiet — just starring at him. Howard took the safe keys from him and opened the safe. He (Beng Tatt) took out an envelope with the words, 'last will of Datuk Khaw Bian Cheng dated 24 October 1990'. Howard took that envelope and proceeded upstairs with Richard. He followed them. Howard opened the envelope and read the wills. Howard said to Richard that there were mistakes and that the wills must be redone. Howard did not mention the mistakes. He (Beng Tatt) left without the safe keys.

In the morning of 3 August 1992, Bok Eng told him that 'they have made arrangements for Lim and Dr Gafoor's presence in the house and that an appointment has been made with one Dr Tan'. He was instructed to escort Lim and Dr Gafoor upstairs when they arrived.

At 2.30 pm, one Patricia Lim who was in the house told him that Howard requested her to type some documents. Patricia asked for his help. He told her, he did not know how to use a notebook computer. He did not want to help as he had no wish to involve himself in the preparation of the documents she was typing. After the documents were ready, he got to know that Patricia was preparing the will of the deceased.

On 3 August 1992, he saw the execution of wills at Pykett Avenue. Present were Lim, Dr Gafoor, Cheng Poon and Howard. Lim arrived at 4pm. Dr Gafoor arrived shortly thereafter. Say Bee was away, at Penang Hill. Lim, Dr Gafoor and the deceased were seated at a long table. Cheng Poon was present. Richard appeared on and off. The wills were not signed at 4pm. They waited for half an hour. Howard brought in documents in loose sheet form from his room. Howard gave those documents to Lim. 'First round, the third defendant brought in more than ten sheets. Then from subsequent rounds, he brought in five to six sheets in each round. Howard made about five to six trips. After each trip, Howard waited for a while in his room. Each time he handed the documents to Lim.'

He was very close to the deceased when the deceased signed those documents. He turned the pages for him. 'It was not true that Lim read and explained the wills to the deceased. It was not read (nor) explained to the deceased.' Howard was commuting between the living room and his room. After depositing the last batch of documents, Howard stationed himself at the table. The execution of documents commenced at about 4.30pm and ended around 6pm. Beng Tatt said that the 1992 wills appeared to be the documents signed on 3 August 1992. The deceased was quiet throughout the execution of documents. He did not leave the deceased.

Whilst waiting for Dr Gafoor and Lim, the deceased wanted to go to Penang Hill. It appeared that the deceased was in a hurry to go there. Immediately after signing the documents, the deceased left for Penang Hill. Lim took possession of the documents.

On 12 August 1992, Richard told him that Lim had asked him to collect some documents for the deceased and Dr Gafoor's signatures. At Lim's office, Lim handed him some loose sheets of documents and said that some documents signed on 3 August 1992 had mistakes. Lim asked him to take those loose sheets to the deceased and Dr Gafoor for their signatures. He was not asked to obtain Dr Gafoor's' rubber stamp. He took those loose sheets. The deceased signed those loose sheets; he was the only other person present. He had explained to the deceased that Lim needed the deceased's signature on those loose sheets as the previous documents had mistakes. 'The deceased did not say anything. He just signed.'

Next, he presented those loose sheets to Dr Gafoor who signed on all those loose sheets. He was the only other person present. He had explained to Dr Gafoor that those loose sheets were from Lim who had explained that the earlier documents had mistakes and that he (Dr Gafoor) was required to sign those loose sheets. The next day, he handed those loose documents to Richard. Beng Tatt said, he could recognize only one of those loose sheets he collected on 12 August 1992.

On 26 August 1992, Lim came to his office with further documents, 1cm thick, for the signature of the deceased. Lim explained to the deceased that the earlier wills were wrong and needed to be redone. The deceased did not respond; he signed those documents in the presence of Lim. Then,

Lim instructed him to take those documents to Dr Gafoor for his signature. On 28 August 1992, at Dr Gafoor's clinic with those documents, he was informed that Dr Gafoor was on vacation. He returned those documents to Lim.

On 4 September 1992, Lim came to his office and gave him the same documents Lim had given on 26 August 1992. Lim asked him to have those documents signed by Dr Gafoor. He kept that stack of documents in his cabinet. Richard had a set of keys to his cabinet. On 14 September 1992, he brought that stack of documents to Dr Gafoor's clinic. Dr Gafoor signed those documents. 'Only the two of us were present'. He had explained to Dr Gafoor that those documents needed his signature and that he (Beng Tatt) was instructed by Lim. He handed those signed documents to Richard; Howard had instructed him that all important documents executed by the deceased must be inspected by Cheng Poon and family.

He kept the accounts of the deceased from 1979 until the death of the deceased. He had custody of the deceased's cheques. Before 1992, each time the deceased wanted a cheque, the deceased would ask him to bring him a cheque. Only after the deceased inspected the cheque would the deceased sign the cheque. For recurrent expenditure, he would prepare the cheques without prior instructions. Nonetheless, the deceased would question the payments. 'That was the routine up and until the end of 1991. From my experience it was difficult to get the deceased to sign a cheque. He had many questions to ask before he would sign a cheque. The deceased was not easy (nor) free with his money. He was concerned about his cash flow.' Before 1992, none of the first to third defendants instructed him (Beng Tatt) on the preparation of the deceased's cheques.

Sometime in May to July 1992, the first to third defendants were instructing him on the preparation of the deceased's cheques — big amount were involved. Each time he consulted the deceased, but each time, one of the first to third defendants would follow him to the deceased's room. 'Then they would ask the deceased for money. The deceased kept quiet. The (first, second or third) defendants then asked him to prepare the cheque and he would prepare the cheque. The deceased then signed the cheque.' Before 1992, the deceased only instructed him to prepare cheques of a few thousand for Cheng Poon and Richard. From 1992, the amounts requested to be drawn by Cheng Poon, Richard and Howard were very large — all more than RM100,000, and for a few hundred thousand ringgit. The deceased did not ask any questions. He signed the cheques. He did not and does not think that the deceased knew what he was signing. In June 1992, more than RM2m were signed to Cheng Poon, Richard and Howard. In all his years working for the deceased, he had not seen such large withdrawals within such a short period from the deceased's accounts. In December 1992, the deceased's account had less than RM10,000.

Cheng Poon never worked in his life. Richard, as Managing Director of Khaw Bian Cheng Sdn Bhd, was drawing RM2,500 a month. Khaw

A Bian Cheng Sdn Bhd is not an active company; it has only a piece of land — Pykett Avenue. Howard was not working in Penang.

Beng Tatt thus explained the accounts found in the bundles: He prepared the accounts — PB1(127–143). PB1(127–130) was the Thai accounts. PB1(132) was the 'ancestral worship' account. PB1(133–135) B was the summary of the accounts of the deceased from January 1993 to 10 April 1993. PB1(136–138) was the account in continuation of PB1(133–135), from 10 April 1993 to 31 March 95. PB1(139–142) was the US accounts. He prepared the Malaysian accounts. He did not prepare the Thai or US accounts. He prepared the US accounts from details given orally by Howard.

C In the month of June 1992, the deceased wrongly signed eight cheques — P6(1–8). Sometimes, the deceased tested out his signature on a piece of paper. Sometimes, when the deceased could not sign, he would suggest to the deceased to sign on the following day. Cheng Poon insisted that the deceased sign the cheques 'there and then'. Cheng Poon said, it was his D father's money and he (Beng Tatt) should not interfere but listen to him as he would be his future employer. He (Beng Tatt) was afraid of Cheng Poon, Richard and Howard as he could be sacked if he did not listen to them. 'It was stressful working for the (first to third) defendants. It was stressful as the first to third defendants were giving instructions'.

E After the institution of the present proceedings, Howard asked him to sign a statutory declaration, but he refused as the statements in the statutory declaration were not true.

Other than the sums withdrawn in PB1(150) — a bank statement of the deceased's account — three other sums (RM316,133.06, F RM133,294.02 and RM130,420.55) were withdrawn from other accounts. [see PB1(155)]. But not all withdrawals were taken by Cheng Poon, Richard and Howard. Some were towards monthly expenses.

On 10 April 1993, the deceased had RM26,927.88 in Malaysia. From the details provided by Howard, the US estate, on 31 May 1995, had a deficit account — USD13,187.82 owing to Howard. As for the Thai G accounts, the amount standing to the credit of the estate on 31 March 1993, according to the accounts faxed to him — PB1(129–130) — was Baht174,649.01. On 31 March 1995, the estate in Malaysia had a deficit of RM172,666.31. Richard instructed him to send USD37,021.44 from the Malaysian to the US estate.

H Beng Tatt explained that PB1(129) was the key-in copy from the information extracted from a facsimile copy. In the facsimile copy, the item stated as 'testamentary expenses' in PB1(129) was stated as 'funeral' expenses. Howard instructed him to amend it to testamentary expenses. The Malaysian account never received Baht234,450. The Malaysian estate spent RM39,802.56 on the funeral of the deceased.

I In November 1993, Richard appointed him to work for Khaw Bian Cheng Sdn Bhd, a company without any active business or income. Richard advanced his salary. Glashaus Sdn Bhd is a company owned by

Bok Eng and Quah Bah Bah. Sometime in 1994, Glashaus Sdn Bhd started paying rent to Khaw Bian Cheng Sdn Bhd. Richard instructed him to type (i) PB3(1) — an application by Khaw Bian Cheng Sdn Bhd to the receiver and manager of the estate for a RM190,000 advance; and (ii) PB1(158) — the instructions of Khaw Bian Cheng Sdn Bhd to Tan Chiew Hun to obtain a purchaser for Pykett Avenue at the price of RM16,215,760.

The deceased had a BMW 735IL (a car he paid in full) in the name of Richard. The deceased owned a Rolls-Royce in the name of Cheng Poon. The deceased used Cheng Poon's name as he the deceased was old and could not obtain a loan. He witnessed the will of the deceased dated 27 December 87 — DB1(B)(3–5).

Under cross-examination by Mr Koh, Beng Tatt testified that the deceased had more properties than those listed in the 1989 deed. In the afternoon, on 3 August 1992, he saw Richard at Pykett Avenue. Richard was there for a while. After that, he did not see Richard.

He prepared the accounts of the deceased for submission to the Inland Revenue. He also prepared the accounts of Khaw Bian Cheng Sdn Bhd. He had custody of the personal cheques of the deceased. The deceased had a personal safe in a cabinet. The deceased was a careful man. Prior to 1 August 1992, he (Beng Tatt) was keeping the safe keys. The deceased entrusted that key to him after he worked for five to six years for the deceased. 'The deceased trusted me,' Beng Tatt said.

Mr Koh: I put it to you ... the deceased kept all safe keys.

Beng Tatt: Not true. I had one set.

Mr Koh: I put it to you ... the deceased's set was the only set.

Beng Tatt: I had one set.

Prior to him handing the safe keys to Howard, each time the safe was opened the deceased was present.

On 3 August 1992, (i) the deceased did not have any documents in front of him, (ii) he did not serve drinks to Dr Gafoor and Lim, (iii) there was not much conversation, and, (iv) Cheng Poon, the deceased, Dr Gafoor and Lim were together from 4.30pm to 6pm; Howard was also present although he was moving in and out of his room. After the arrival of Dr Gafoor and Lim, the deceased asked him to stay on; he stayed on.

Mr Koh: It was Lim Cheng Chuan who asked you to see Dr Gafoor about some documents. It was on 12 August 1992.

Beng Tatt: Yes, Lim Cheng Chuan gave me some documents and he asked me to get it signed by the deceased and after that by Dr Gafoor. ...

Mr Koh: Do you remember the deceased asking Howard to make some changes to the documents, that is on 3 August 1992?

Beng Tatt: I did not hear such from the deceased.

Mr Koh: The third defendant brought out three sets of documents from his room?.

Beng Tatt: He took out loose sheets. It was not bound together. He passed it to Lim Cheng Chuan. I could see it was in loose sheet form.

He had not seen the 24 July 1992 deeds. Sums of RM866,000 were promised to Cheng Bok, Cheng Poon and Cheng Liat from the sale of the Batu Ferringhi land. That land was sold in June/July 1991. The deceased agreed to give 45% to Cheng Bok, Cheng Poon and Cheng Liat. The documents he gave Richard were the wills dated 3 August 1992. He did not refer to the deceased as Howard had instructed him to refer only to the first to third defendants. He could not refer to the deceased as the deceased was not well. But he reported to the deceased that the 1992 wills were handed to Richard.

The deceased was not a quiet man. He liked to talk. He (the deceased) liked to talk to him. He liked to talk about his grandfather (Sim Bee). After discharge from the hospital, the deceased was a quiet man.

He did not prepare the letter dated 8 July 1991 from the deceased to Tan Peng Seng. He had not seen the letter dated 9 July 1991 from Lim to the deceased.

From July to December 1992, a few million ringgit was withdrawn from the deceased's account. Each time a large sum was withdrawn, he informed the deceased.

In July 1992, after the deceased was discharged, he received a bonus. He did not think the deceased knew what he was giving. When the deceased sold the Batu Ferringhi land, he gave a bonus to Say Bee and himself. The deceased insisted on the second bonus.

Mr Koh: Since the deceased insisted on giving you a bonus, then he was not senile.

Beng Tatt: Usually he would only give a bonus for each land sale. But that was the second bonus. First bonus he gave a 12 months' bonus but on the second occasion he gave 15 months' bonus. I cannot explain the second bonus.

Cheng Poon instructed him to prepare PB2(5) — the deceased's instructions to his trustees with regard to the RM826,000 to Cheng Bok and RM866,000 to Cheng Liat. The deceased had no money to pay Cheng Bok and Cheng Liat. Cheng Bok read PB2(5). When the deceased signed PB2(5), he (the deceased) was a bit senile.

Mr Koh: I put it to you ... when the deceased signed PB2(5) the deceased was not senile.

Beng Tatt: He was already not well. He was not that senile, just that when you tell him anything he would not understand. Anything you tell him he would keep quiet.

In 1992, the deceased instructed him to pay interest to Cheng Bok and Cheng Liat. Cheng Poon suggested the payment of interests when the deceased could not pay Cheng Bok and Cheng Liat.

The deceased gave a mandate to Cheng Poon to draw on account CA 1540021212. Cheng Poon instructed the cheque 00129790 for

RM1,436,781.57 for the redemption of the Teluk Bahang land; Cheng Poon instructed the early settlement of the overdraft account. When he informed the deceased of that cheque, the deceased just stared at him. 'I don't think he understood me.' The deceased signed that cheque.

The deceased instructed him to prepare the cheques for the second bonus to Say Bee and himself. Beng Tatt did not agree that the deceased in July 1992 was not senile. 'He just instructed, "write, write, write". He did not explain himself. He mentioned the amount.'

Cheng Poon, Richard and Howard instructed him to prepare the cheque for RM866,000 to Cheng Poon. He presented that cheque to the deceased for signature. The deceased signed that cheque. 'The deceased did not know what he was signing. I believe ... from February 1992 the deceased was not aware of what he was paying out. From February 1992, when he explained cheque payments to the deceased, 'mostly he would stare at me.' He was instructed to prepare the following cheques: RM866,00 to Cheng Poon, RM197,000 to Cheng Poon, RM225,000 to Howard, RM225,000 to Bok Eng, RM225,000 to Cheng Poon, RM512,063.70 to Cheng Poon, RM182,000 to Howard, RM39,000 to Howard, RM31,000 to Gim Chuan, RM31,000 to Howard, RM100,000 to Gim Chuan, RM100,000 to Howard. He said to the deceased that the reasons for those payments were that of Cheng Poon and Howard. He did not explain the latter payments as Cheng Poon and Howard had explained those payments in his presence. 'I did not believe even then that the deceased understood the explanation given.'

Beng Tatt denied that he prepared DB1(E)(129) — the acknowledgement of Tan Peng Hin and Tan Peng Seng of their receipt of RM187,500 and RM375,000 respectively, with regard to the sale of the Batu Ferringhi land, from the deceased. Howard explained to the deceased the payment of RM100,000 to Gim Guan.

Mr Koh: I put it to you ... the RM100,000 was for (Gim Chuan) living expenses in the US.

Beng Tatt: I don't know about that.

Mr Koh: I put it to you ... you objected, as it could not be justified.

Beng Tatt: I did not do so.

Mr Koh: If Gim Chuan would come and she would testify that she explained to me the purpose of the RM100,000, would you say that she would be lying?

Beng Tatt: I would say so.

On 1 July 1992, Cheng Bok instructed him to prepare two payments — RM11,027 and RM8,000 — to himself. Cheng Bok said that he had explained the payments to his father. He informed the deceased of what Cheng Bok had said and the reason for those two payments. The deceased did not understand him.

On 27 July 1992, the deceased called him to write a cheque of RM5,000 to one Ong San Huah. On 1 August 1992, the deceased instructed him to pay RM40 for a Justice of the Peace tie. The deceased also

A instructed him to pay RM480 to one 'KS'. The deceased said, 'give me RM480'. There was a standing instruction to pay a yearly sum of 200 English pounds to Sally Khaw.

Cheng Poon instructed him to circle certain figures in PB4(6) and charge those sums to the estate. He circled those figures Cheng Poon said B should be charged to the estate — see PB4(6–10). Later, Richard took out some of the circled items; the estate did not pay those items Richard had taken out.

He saw Patricia Lim. When he refused to help, she and Howard, not Richard, went upstairs.

C Mr Koh: I put it to you ... what you testified about Lim Cheng Chuan coming on 26 August 1992 with loose sheets for the deceased's signature is a lie.

Beng Tatt: I don't agree.

Mr Koh: I put it to you ... on 25 August 1992 the deceased was in Thailand.

D Beng Tatt: I saw him on 26 August 1992. I cannot explain why the deceased's passport shows that the deceased was not in the country on 26 August 1992.

Mr Koh: I put it to you ... you are lying about the deceased not knowing about the cheques and the payments and what you said (had) E transpired on 3 August 1992.

Beng Tatt: I am not lying, possibly I may have mixed up the dates.

After the institution of these proceedings, Howard asked him what was happening. He said to Howard what he said in court. Howard asked if he (Beng Tatt) was certain of the dates. He (Beng Tatt) replied he was. He F told Howard that he recorded the dates.

Mr Koh: I put it to you ... you were preparing to come to court and lie.

Beng Tatt: I deny that.

Under Mr Yeoh's cross-examination, Beng Tatt testified that the health of the deceased before his wife passed away was good. But the deceased G complained of palpitations. He could not remember whether the deceased was ever hospitalised before his wife passed away. 'After the deceased's wife passed away, the deceased's health was all right. He was very sad that his wife passed away.'

During working hours, he would know if the children of the deceased H were visiting. 'Cheng Bok visited his father maybe three or four times in a year'. Cheng Liat was a frequent visitor, until he was barred from Pykett Avenue. Cheng Hum and Liang Imm were also frequent visitors.

He could not recall the deceased having taken an overseas trip whilst his wife was alive. After his wife passed away, the deceased made several I overseas trips — to London, to the States and China as he could recall. Cheng Poon arranged those trips.

He and Cheng Poon were present when the deceased said he did not want the 1989 deed. Hamid explained the 1989 deed to the deceased. He

(Beng Tatt) was not clear whether the deceased ordered Cheng Poon out of the house, but he and Hamid were present when the deceased scolded Cheng Poon. He was at the E & O Hotel when the deceased had one of his meetings with his sons and Nik Saghir. He and Say Bee accompanied the deceased. He was outside the meeting room. He attested the will dated 27 December 1987. When the deceased signed the will dated 27 December 1987, he and Goh Eng Kee were present.

The deceased instructed and he prepared the monthly maintenance of RM1,400 each to Cheng Hum, Cheng Bok, and Cheng Liat. The deceased shouldered as well education/other expenses — RM1,000 to Cheng Hum, RM1,000 to Cheng Liat and RM5,000 to Cheng Bok. After the sale of the Ayer Itam land, the deceased terminated the monthly payments to Cheng Hum. The monthly payments to Cheng Liat and Cheng Bok were stopped when interests on the RM826,000 and RM866,000 were paid to them.

The deceased instructed and he typed the letter barring Cheng Liat from Pykett Avenue — DB1(B)(9). Cheng Poon who was present did not say anything to him (Beng Tatt). He gave that letter to the deceased. He did not type DB2(A)(9).

In re-examination, Beng Tatt testified that after he handed the safe keys to Howard, he did not know of the whereabouts of the (1990) wills. After 1 August 1992, whenever the safe was opened, he was not required.

DB1(D)(347–349) was his hand written calculation of the amount of money in the deceased's account; Howard asked for that computation. He (Beng Tatt) took into account some of the payments that should be made; the payments RM1,026,000 (a rough estimate) to Cheng Bok, RM105,000 (for a van) and RM866,000 to Cheng Liat were never paid.

Beng Tatt clarified that he said the deceased was not well as the deceased was forgetful, could not sign properly, and could not understand what was said to him. Beng Tatt said, he would not know whether the 1992 wills were ever handed to the deceased. From February 1992, the deceased would not comprehend the reason for the cheque he was signing. Before February 1992, even for small amounts, the deceased would ask the reason for each cheque. Before February 1992, he could not recall the deceased having paid large sums, as in PB1(E)(129) to strangers, or to the family. Before 1992, he (Beng Tatt) would know the reason of the deceased's payments.

Cheng Poon took RM140,000 from the deceased account and deducted the expenses in PB4(6–10)(the circled items) he charged to the deceased. That RM140,000 was paid into Cheng Poon's account — see PB1(147). The deceased was giving to Cheng Poon an occasional RM1,000 to RM3,000. 'When Cheng Poon asked from his father, the deceased would give him. I recorded it in the accounts.' Bok Eng, Richard, Howard and Gim Chuan were each receiving RM50 a week from the deceased. That was also recorded.

'Although I may have been mistaken about the date 26 August 1992, I was not lying about the events. That all had taken place. Maybe the date

I said as 26 August 1992 was 25 August 1992. It was approximately 26 August 1992.'

Beng Tatt said that the suggestion that he was preparing himself to lie in court was and is not true. 'Personally, I have nothing against the first and third defendants. They have treated me well. Richard has also invited me to work for Khaw Bian Cheng Sdn Bhd. There was and is no reason for me to lie in court. I was summoned to court. I am here to tell the truth.'

In further examination, Beng Tatt testified that the calculation in DB1(D)(348) took into consideration payments intended for Cheng Liat and Cheng Bok. He could not remember the figures in DB1(D)(349). The deceased was very happy when he saw the offer for his Benson land. The deceased asked him to show the offer to Cheng Poon and to call Hamid to the office. The deceased told Hamid to sell the Benson land for more than US$2m. Cheng Poon was present. The deceased who was afraid that Cheng Bok would sell his (Cheng Bok) house (124 Jalan Dato' Sulaiman, Johore Bahru) instructed him to keep the title deed. After the deceased passed away, he returned the title deed to Cheng Bok.

Under further cross-examination by Mr Koh, Beng Tatt said that DB1(D)(347–349) was personally instructed by Howard.

Mr Koh: I put it to you ... Howard did not instruct you.

Beng Tatt: He instructed me. ...

Mr Koh: Isn't DB1(D)(354–355) a full record of the RM140,000 taken by Cheng Poon?.

Beng Tatt: The figures in DB1(D)(354–355) were not audited, but it was an account of how the RM140,000 was spent by Cheng Poon.

RM38,274 was transferred to the BBMB. RM16,484 was paid to Cheng Bok. The expenses in DB1(D)(354–355) were not recorded in the estate account; only the RM140,000 taken by Cheng Poon was recorded. Whilst the deceased was alive, he prepared and kept the accounts of Khaw Bian Cheng Sdn Bhd. Richard appointed him to work for Khaw Bian Cheng Sdn Bhd at a monthly salary of RM650. After the appointment of the receiver and manager, Bok Eng asked him to leave Khaw Bian Cheng Sdn Bhd as there was no further work for him.

Mr Koh: I put it to you ... you were told not to come to Pykett Avenue because files were being stolen.

Beng Tatt: I was not told. I was only given the reason of the appointment of the receiver and manager.

Mr Koh: The first to third defendant, they always treat you well?

Beng Tatt: They have always been treating me well. There is no grudge between us.

The testimony of the litigants

The litigants who testified, and all testified in the English language, were Cheng Bok, Cheng Liat, Richard, Howard and Cheng Hum.

Cheng Bok testified that he was not in Pykett Avenue when the 1992 wills were signed. He was not aware that the deceased, in August 1992, would be signing wills. The 1990 wills were signed in October 1990. He was present when the deceased signed a set of wills in March 1990. About five or six days after the burial of the deceased, Lim read the 1992 wills, at Pykett Avenue, to him, Cheng Poon, Richard, Howard, Say Bee, Beng Tatt and Bok Eng. Only then, he got to know of the 1992 wills.

He visited the deceased every two to three months. Each time, he stayed for two to three days. Cheng Poon disliked him staying too long. Whilst his mother was alive, he made more frequent visits to Pykett Avenue. When the deceased was admitted to the LWE Hospital in July 1992, he was in Thailand. He came back, on 17 July 1992, and visited the deceased at the hospital; the deceased was quiet and did not respond to him. After the deceased was discharged, he visited the deceased at Pykett Avenue; he stayed in the same room as the deceased.

He was given to understand that the deceased was warded for six weeks in Singapore in 1993. He was not aware that the deceased was warded. He was told, each time he telephoned Pykett Avenue, by Say Bee or Beng Tatt, that the deceased was holidaying in Kuala Lumpur. Say Bee and Beng Tatt informed him that Cheng Poon had instructed them to inform him so. Sometime later, Say Bee or Richard told him that the deceased was in a coma in Singapore. He rushed to Singapore with his children. When he saw the deceased, the deceased was in a coma in the intensive care unit. The following day, the deceased passed away. He was shocked that Cheng Poon and Richard had not informed him that the deceased was warded in Singapore. He would have visited the deceased much earlier if he had been informed. He believed his other brothers and sister were also not informed. They were kept in the dark.

When his father died, he was in Singapore. He felt that the body should be taken back to Penang for funeral rites and for relatives and friends to pay their respects. Cheng Poon, Bok Eng, Richard and Howard overruled him. Instead, the deceased's body was lying in a cheap funeral parlour for four days; the deceased's body was lying on a board from 9 am to 6pm. Cheng Poon, Richard and Howard were not at the funeral parlour. Only he was present with his second son. In the evening, after the coffin arrived, he asked Howard to be photographed with the body of the deceased. Howard declined; he would not be near the body. Cheng Poon, Richard and Howard did not mourn. Cheng Poon was 'euphoric'; he bought two diamond studded watches and showed off the watches at the funeral parlour. The deceased's body was taken back to Penang in a lorry. He had proposed to Cheng Poon to fly the body to Penang. But Cheng Poon said it was 'dead meat'. No one accompanied the body as it was taken to Penang. He was very sad that the remains of the deceased were so treated.

The deceased, a Buddhist and a Taoist who believed in proper funerals and proper rites, was careful with money. He could not remember the deceased having given large sums, before 1992, to his children. The

deceased, well behaved and disciplined, would not give money easily to his children. The deceased was strict with him. In 1957, when the deceased purchased a Holden car for him, the deceased mortgaged his (Cheng Bok) house and would not pay him the rents received. In 1967, when the deceased gave him RM60,000, the deceased made him transfer three houses in Kulim to the deceased. Although he was more charitable as he got older, the deceased was still careful with his money. The deceased cared for his reputation; he honoured his obligations and his word. His mother agreed to give Chim, Cheng Liat and Cheng Poon, each 15% of the sale proceeds that would be received from the sale of the Batu Ferringhi land. The sale was concluded. But he did not receive his 15% share; he only received some interests on his share (RM826,000).

In 1988, the deceased had a disagreement with Cheng Poon. He had to separate them. Both, apparently, were after the same woman. Sometime in 1990, the deceased informed him that the deceased had appointed Teik Lim, Cheng Poon, Cheng Poon's son and Cheng Bok as the trustees of his wills. The deceased informed him that the 1990 wills prohibited any challenge to the 1990 wills.

Both the 1990 and 1992 wills stipulated a limit of RM40,000 to be spent on the deceased's funeral. Cheng Poon spent RM63,000 on the funeral. When Lim informed him that the 1992 wills provided for the distribution of the estate 30 years after the death of the deceased, he knew the 1992 wills were not wills of the deceased. The deceased was not inconsiderate to his children; however, his children, 30 years after his demise, would also be dead. There was an instance when the deceased intended that Pykett Avenue should not be sold within 10 years from the date of his death. He, Cheng Liat and Cheng Poon pleaded to the deceased that their deaths were approaching. The deceased relented and stipulated five years instead of ten in the 1990 wills. The deceased could not have provided for the distribution of his estate 30 years after his death.

He asked Dr Gafoor, in January 1994, of the events on 3 August 1992. Dr Gafoor told him that he (Dr Gafoor) was asked to go to Pykett Avenue. Dr Gafoor thought that the deceased was ill. Dr Gafoor said that he was surprised he was asked to witness the execution of wills. Dr Gafoor told him that Beng Tatt handed him, sometime around 12 August 1992, loose documents, purportedly from the 1992 wills, for his signature. Dr Gafoor also told him that Beng Tatt handed him, on or about 14 September 1992, further loose sheets of documents for his signature. Having heard Dr Gafoor, he suspected that the 1992 wills were bad and defective.

Sometime in March 1993, with Cheng Liat, he went to the office of Lim. Lim who appeared nervous did not want to speak to them. He asked Lim whether he prepared the 1992 wills. Lim replied that the 1992 wills were prepared by Howard. Lim told him that he (Lim) thought he was to prepare the 1992 wills; instead, he was asked to witness the 1992 wills. When he (Cheng Bok) found out the truth about the 1992 wills, he withdrew his consent given to Cheng Poon, Richard and Howard for their administration of the Thai, Malaysian and US estates. He applied to the

Thai manager for the name of the solicitor who prepared PB2 (49–60). He received no reply. Subsequently, in Penang, he met the Thai manager who gave him the name and address of the solicitor who prepared the petition for administration of the Thai estate. He instructed his solicitors to write PB1(86, 88–101). When Richard and Howard petitioned the US courts for administration, they had received his demand. Despite the injunction of the High Court, Cheng Poon, Richard and Howard sold a condominium in Florida and 100 acres of land in Arizona. He had given them notice not to proceed with the sale. Cheng Poon, Richard and Howard refused to hand the sale proceeds to the receiver and manager of the estate of the deceased.

On the proposed development of Pykett Avenue, there was a Memorandum of Understanding ('MOU') between the trustees in the 1992 wills and Gloria Bay Sdn Bhd. He signed that MOU as he was told that condominiums on Pykett Avenue would bring income to the estate. However, that MOU was not finalised; Richard withdrew at the very last minute; Richard and Howard destroyed the MOU. He saw them burning the MOU at Pykett Avenue. He had not instigated Howard to burn the MOU. Howard burned the MOU as his request for an undertable payment — RM500,000 and a Mercedes Benz sports car — was turned down.

The accounting entries — PB1(151) — related to monies payable to him and Cheng Liat (RM826,000 and RM866,000). However, Cheng Poon, Richard and Howard pestered and pressurised the deceased into utilising the funds, approximately RM1.7m, to redeem the Teluk Bahang land and to transfer the Teluk Bahang land to Cheng Poon, on 3 August 1992. The deceased did not sign the transfer of the Telok Bahang land to Cheng Poon; the deceased did not know what he was doing.

In 1991, the deceased was well. In 1992, the deceased was not his usual self. Sometimes, he would not answer. He believed the mental health of the deceased was failing. In 1992, after discharge from the hospital, the deceased was starring for hours and not turning the newspapers in his hands. The deceased's conduct was strange; sometimes, throughout an entire dinner, he would not say a single word. The deceased was not able to feed himself.

Cheng Poon, Richard and Howard never worked in their lives. They could not have purchased all the properties in their names. All cars were purchased by the deceased; Cheng Poon, Richard and Howard merely held them for the deceased. Cheng Poon, Richard and Howard 'looted and plundered'. 'Once they sense the blood, they came ... like sharks'. His mother had jewellery, about RM2m worth, antiques and expensive crockery. Cheng Poon and his wife kept that jewellery, antiques and expensive crockery. All personal property of their parents are retained by Cheng Poon. Cheng Poon has not surrendered any of that property to the receiver and manager of the estate.

All other children of the deceased were angry but hapless as Cheng Poon, Richard and Howard 'looted and plundered'. They were scared of Cheng Poon who was in a position to influence the deceased into cutting

A them off from the deceased's will. When Cheng Hum failed to visit the deceased, Cheng Poon instigated the deceased into terminating Cheng Hum's allowance that was paid for the past 60 years. Cheng Hum's house was confiscated at Cheng Poon's instigation. Cheng Liat was refused entry to Pykett Avenue after Cheng Poon poisoned the mind of the deceased.

B Since the death of the deceased, he had been back to Pykett Avenue on two or three occasions. Prior to the withdrawal of his consent for the application for probate, he could enter Pykett Avenue. After he withdrew his consent, Cheng Poon became unfriendly. He had only been back to Pykett Avenue on one occasion; Cheng Poon and his wife refused to open the door for him. He had to sleep in Cheng Liat's house. Since that day, C he chanced upon with Cheng Poon. He told Cheng Poon that the 1992 wills 'do not look right'. He said to Cheng Poon that someone must have tampered, altered and or changed the 1992 wills. Cheng Poon who denied knowledge was nervous; his face was green and pale. He was shaking as he was talking. Cheng Poon said that Richard and Howard were the culprits D and he had nothing to do with it. He asked Cheng Poon why he had not stopped them. Cheng Poon just kept quiet. He also met Cheng Poon, on another occasion, in the KOMTAR building. He enquired on the properties of the estate. Cheng Poon told him that his side (Cheng Poon) was in control and if he (Cheng Bok) wanted to challenge him (Cheng Poon), he (Cheng Bok) would have to challenge him in America. Cheng Poon told E him that his side (Cheng Poon) would get all the property of the estate in Thailand, US and Penang and that if he (Cheng Bok) wanted his money 'to come to America'.

He told Yeoh Keat Chye (DW2) that Cheng Poon apart from forging the 1992 wills had taken the Telok Bahang land and the deceased's cars. F He told Yeoh Keat Chye that any settlement could be discussed if the Telok Bahang land, cars and his money were returned. Yeoh Keat Chye said that he (Yeoh) would convey his message to Cheng Poon.

Cheng Bok said that he and Cheng Liat, under the 1990 or 1992 wills, held the majority interest. Cheng Poon, Richard and Howard, by tampering G with the 1990 wills, had disobeyed the 1990 wills. By the 1992 wills, Cheng Poon, Richard and Howard enhanced their benefits and gained control of the estate.

In both the 1990 and 1992 wills, Cheng Hum was only given RM20,000 as Cheng Hum had inherited, even whilst the deceased was alive, seven shophouses at Dato Kramat Road from their paternal grandfather (Joo H Chie), seven acres of land behind the Kek Lok Si temple from their paternal grandmother (Lim Swee Eam), a bungalow from the deceased and 'a free meal ticket for the last 65 years'. 'Cheng Hum was amply provided for.'

Cheng Bok proclaimed that he is ready, willing and able to perform his I duties as a trustee. He testified that he is a Buddhist and a Taoist. He did not think that Cheng Poon has any religion. Cheng Bok doubted whether Cheng Poon would carry out the religious duties under the wills. He said that none of the deceased's children are allowed into Pykett Avenue to pay

their respects to the ancestral tablets at the ancestral hall. Cheng Bok further declared that he would look after the welfare of Cheng Been and carry out the wishes of the deceased.

Under cross-examination by Mr Koh, Cheng Bok denied that Mr John Khoo had asked Cheng Poon to sign the MOU. He also denied that John Khoo had suggested to Cheng Poon to execute the MOU and that he (John Khoo) would hold the MOU and not release it to Gloria Bay. He denied that Richard said that he (Richard) was afraid Cheng Poon would sign the MOU and hand it to John Khoo. He further denied it was then that he (Cheng Bok) suggested to Richard to burn the MOU. He maintained that he received PB1(49–64) [which is identical to DB1A(133–148)] from Lim and he gave PB1(49–64) to Richard. Cheng Bok agreed that the MOU was not finalised as one signatory was missing. He denied that the MOU was burned at his instigation, that he decided on the funeral arrangements or that he recommended the funeral parlour.

The deceased was furious when he discovered that the 1989 deed [DB1(A)(89–94)] was entirely in Cheng Poon's favour; the deceased ordered Cheng Poon out of the house. Thereafter, Cheng Liat became the deceased's favourite son, for about six months. Then, Cheng Poon poisoned the mind of the deceased who then refused Cheng Liat entry into Pykett Avenue. Thereafter, Cheng Poon became the favourite son. For 10 years, he was not allowed into Pykett Avenue. The deceased gave him RM20,000 to marry a third time. The deceased chose the bride for him. When the deceased entered LWE Hospital, he was on his honeymoon. The deceased paid him interest on his RM826,000. In 1992, the deceased was senile. The deceased did not know what he was doing; everything was done without his consent. In 1992, after the deceased left the hospital, the deceased was not himself. Most of the time, even before the deceased entered the LWE Hospital, the deceased could not answer. The deceased could not have signed those voluminous (1992) wills. The 1992 wills were not read to the deceased. The deceased could not have understood the 1992 wills. The deceased was mentally blind. Cheng Bok denied that the deceased did not want to see him as he was always asking for money. He only asked for small sums. As for the RM826,000, he was only asking what was agreed by his mother. Cheng Bok denied he was disliked by the deceased who he said was a forgiving man. Cheng Bok agreed that he did not visit Pykett Avenue as the mood after he commenced his proceedings was hostile. He disagreed that Richard and Howard were the deceased's favourite grandsons. His son was the favourite grandson. However, Cheng Bok agreed that Cheng Poon was the deceased's favourite son.

Under cross-examination by Mr Yeoh, Cheng Bok testified as follows. Before 1988, he frequently visited his parents. After his mother passed away, his visits to Pykett Avenue were much less frequent. The deceased was very close to his wife. He was dependent on her and he consulted her on all family affairs. Before 1988, the deceased, although complaining of pain arthritis on his hands and swelling on his feet — was quite a healthy man. In 1987, the deceased and his wife were hospitalised at the Mount

A Elizabeth Hospital, Singapore. The deceased was hospitalised for the usual complaints. His mother was hospitalised because her red blood count was low. His father and mother who loved each other very much were hospitalised together as they needed each other's company. They were quiet inseparable. The deceased was gravely affected by the death of his wife; but after a few months, he became his old self.

B

Cheng Bok agreed that the deceased was closer to the children who lived with him. Cheng Hum was not close to the deceased. Cheng Liat, before 1988, was quite close to the deceased. Before his mother passed away, he was also quite close to the deceased. After his mother passed away, his relationship remained the same with the deceased. He was one C of the deceased's favourite sons.

Until after January 1992, he did not notice any deterioration in the mental health of the deceased. Before that, even after his mother passed away, he did not notice anything wrong with the mental health of the deceased.

D Hamid was the financial advisor and an old friend of the deceased. Hamid was also a long time friend of Cheng Poon; he was closer to Cheng Poon than him. Hamid always advised the deceased to be fair to all his children. He was informed that Hamid had advised the deceased not to withdraw RM1.7m to redeem the Teluk Bahang land as that money was E to pay him and Cheng Liat.

Cheng Bok denied all knowledge of the 1989 deed until after the death of the deceased. He denied any close relationship with Cheng Liat. Cheng Liat did not inform him of the happenings in Pykett Avenue.

In 1990, in a hotel in Singapore, there was a meeting between the F deceased, Cheng Liat, Cheng Poon, Hamid and himself to discuss the will of the deceased. He was asked to attend that meeting. The deceased agreed to the equal division of his property between Cheng Liat, Cheng Poon and himself. Cheng Bok denied he, Cheng Liat or Cheng Poon had arranged that meeting for the deceased to agree to the division of his property. Cheng Bok agreed that at that meeting, Cheng Poon, Cheng G Liat and himself agreed to an equal division of the estate. Cheng Bok said he was not sure whether the deceased was present when they, the three brothers, reached their agreement. He did not ask the deceased about his (the deceased) prior wills. few days after that meeting, he was called to the office of Nik Saghir. Cheng Poon, Cheng Liat and Hamid were also at Nik Saghir's office. There, he was informed that the will of the deceased would H be prepared. He denied that he was present when the deceased instructed Messrs Nik Saghir; the three sons waited outside Nik Saghir's room. The will was not signed in Nik Saghir's office. About a week or two after that meeting at Nik Saghir's office, Lim, Nik Saghir, Cheng Liat, Cheng Poon and himself met at the E & O Hotel, Penang. The deceased signed some I documents in a room. He was not present when the deceased signed the wills that Nik Saghir prepared. He had not and has not seen that document. Towards the end of 1990 or beginning of 1991, he got to know from the deceased of the 1990 wills. He knew then that the deceased had executed

an earlier will at the E & O Hotel. He thought the deceased was referring to the E & O will. He was and still is in the dark on the circumstances leading to the execution of the 1990 wills.

After the 1992 wills were read, he took possession of the 1990 wills lying in the deceased's bedroom. He played no part in the preparation of the 1990 wills. The deceased who never discussed the 1990 wills mentioned that he (the deceased) has a secret weapon in his will. He believed that cl 12 of the 1990 wills was that secret weapon. The deceased incorporated a deterrent clause to prevent future dispute, after he (the deceased) found out that the 1989 deed was not in accord with his wishes. He believed that Cheng Hum, although the eldest son, was only given RM20,000 as Cheng Hum was amply provided for, as Cheng Hum and his wife had refused to attend to the ancestral tablets and as the deceased despised Cheng Hum's 'allergy to work'. The deceased said, Cheng Hum was selfish, had not visited him when he was sick and had not cared for him when he needed attention. But the deceased still loved Cheng Hum as a son. Cheng Bok disagreed Cheng Hum was excluded because it was not the deceased's true will. In 1990, the deceased was not easily susceptible to influence or instigation.

Cheng Bok admitted that he inherited six houses, as joint tenant with the deceased, from his paternal grandfather. In 1967, in exchange for RM60,000, he surrendered those houses to the deceased. Cheng Hum inherited seven shophouses, as joint tenant with the deceased, from their paternal grandfather. Lim Swee Eam bequeathed RM14,000 to Cheng Hum. Liang Imm inherited much more from their paternal grandmother.

In re-examination, Cheng Bok clarified that the deceased was depressed by the death of his wife for three to six months. After that, with new found freedom, his father forgot about the death of his wife.

Under further cross-examination by Mr Koh, Cheng Bok alleged that the deceased, in 1992, was merely following Cheng Poon's directives; for that reason, it was easy for Cheng Poon, Howard and Richard to plunder RM3.2m from the deceased. He found the 1990 wills (PB1, PB2 and PB3) in the condition before the court, that is, in a red comb bound bundle.

Cheng Liat, who said that he adopted the testimony of Cheng Bok, testified as follows. In 1988, his mother told him that she would be giving Cheng Bok, Cheng Poon and him each 15% of the sale proceeds from the sale of her Batu Ferringhi land.

He read the 1989 deed. He pointed out to the deceased that Cheng Bok and himself would not have anything. The deceased asked him to get Lim's explanation. He waited until Cheng Poon was in Thailand. Lim confirmed to the deceased that Cheng Bok and Cheng Liat, under the 1989 deed, would not have anything. The deceased arranged with Hamid for a second opinion. Cheng Bok, Cheng Poon, Lim, the deceased, Hamid and himself were at the office of Messrs Nik Saghir. Nik Saghir gave his opinion and advice to the deceased; the brothers remained outside Nik Saghir's chambers. He was informed that the deceased instructed Nik

Saghir to prepare some documents. On one occasion, after that meeting with Nik Saghir, the deceased was very angry with Cheng Poon. The deceased hurled profanity, something he had not done before, at Cheng Poon. The deceased called Cheng Poon a wicked and vicious son and ordered Cheng Poon out of the house.

Prior to that meeting at Nik Saghir's office, the three brothers and the deceased were in Singapore. He told Cheng Bok that he and Cheng Bok, under the 1989 deed, would not have anything.

In March 1990, after that meeting at the office of Nik Saghir, the three brothers, Lim, Hamid and Nik Saghir met at the E & O Hotel. The deceased, Lim and Nik Saghir had a meeting in a room. The brothers remained outside. He believed that the deceased was executing a will. In March 1990, the deceased was of strong will. His children could not broach the subject of his will. The deceased resented that subject as he believed that he was yet not dying. He dared not speak to the deceased on that subject.

The deceased was a strict but good man. He was very careful with money. Many a time, the deceased threatened him, because of his (Cheng Liat) Christian faith, to cut him from his will. But the deceased did not do so. The deceased was domineering and wanted his ways. The deceased who never worked in his life was accustomed to others yielding to him. The deceased would not tolerate any argument. The deceased was very close to his mother who spoiled the deceased. But he was never unfaithful to her. The deceased was a charitable person. In 1975, the deceased generously returned the deposit, when it could be forfeited, to a purchaser. For 20 years, the deceased was donating to old folks' homes and to the blind. The deceased loved all his children. Cheng Poon was not loved more than the other sons. The deceased said that he disliked those who do not work. The deceased did not give money easily to his children. Many a time, his requests for money were turned down. The deceased was tight fisted with his children.

He was not aware, in October 1990, that the deceased had executed a will. After the death of the deceased, he got to know of the 1990 wills. In 1991, the deceased was still well but fickle and easily influenced by those around him. In 1990, after the deceased accused him of poisoning his drinking water, he was ordered to stay away from Pykett Avenue. Whilst the deceased was alive, he made several attempts to enter Pykett Avenue; but Cheng Poon shooed him away. Cheng Liat believed that the deceased, when he ordered him out of Pykett Avenue, was senile as the deceased showed no emotion whatsoever as he was being shooed away. He was sad that he was pushed out of Pykett Avenue.

He was informed and therefore not aware, in July 1992, that the deceased was hospitalised. He was not aware, in 1993, that the deceased was hospitalised in Singapore. He was told, each time he telephoned Pykett Avenue, by Say Bee or Beng Tatt, that the deceased was in Kuala Lumpur. He was told of the deceased's death a day after the deceased had passed away. He did not know why he was not told that the deceased was hospitalised in Singapore.

He suspected, when he learned from Dr Gafoor of the circumstances of the execution of the 1992 wills, that the 1992 wills were invalid. He found out, from Lim, that Lim believed he (Lim) was asked to go to Pykett Avenue to prepare a will. However, Lim was only asked to witness a will. Cheng Poon, Richard and Howard threatened that they would dispose off the assets of the estate and leave Malaysia, leaving him nothing.

Cheng Liat further testified that he is staying in Cheng Been's house. Richard and Teik Lim are the trustees of Cheng Been's estate. Richard threatened to evict him from Cheng Been's house. He had no money to pay the rent that Richard demanded. The deceased had allowed him to stay at Cheng Been's house. Cheng Liat said he would pay the arrears of rent from his beneficial interest in the estate.

Under cross-examination by Mr Koh, Cheng Liat admitted that he was adjudged a bankrupt on 19 September 1990. He received interests on his RM866,000. The deceased paid him interests as the deceased could not pay his share of the proceeds received from the sale of the Batu Ferringhi land. Hamid told him that Cheng Poon used his money to redeem the Teluk Bahang land and to pay for luxury cars.

On the MOU with Gloria Bay, Cheng Liat testified that he saw the MOU burning. He denied that he suggested the destruction of the MOU or that he commenced action 22–271–94 because one Sonny Ho was not given the right to develop Pykett Avenue.

Cheng Liat admitted that he took a loan of RM14,000 from the estate on 24 December 1993. He also admitted that he received a loan of RM15,000 from Bok Eng. Bok Eng released the loan of RM15,000 in three instalments; throwing the last instalment (RM5,000) into the air, she asked him to pick it up. Cheng Poon photographed him as he was picking up that money. Cheng Liat maintained that Cheng Poon was not the deceased's favourite son. The deceased loved all his children.

In 1990, for two months, he was in London with the deceased. Cheng Poon told him that the deceased stopped him, within a week of his return to Penang, from going to Pykett Avenue.

Under cross-examination by Mr Yeoh, Cheng Liat testified as follows. In 1988, his mother, suffering from diabetes, was in and out of the hospital. He came back to Penang from Kuala Lumpur in 1988. By then he had retired. In Penang, he was always in his parents' house. He kept that routine until about three months after his mother's death when the deceased had other company. Sometime in 1989, he pointed out to the deceased that the 1989 deed would leave him and Cheng Bok 'with a nought'. The deceased was not clear of its specific provisions. He did not say to the deceased that Cheng Hum was not provided under the 1989 deed as the deceased had consistently said that Cheng Hum had been amply provided for. For the same reason, he did not say to the deceased that Liang Imm was also not provided for in the 1989 deed. Cheng Poon was in Thailand when he spoke to the deceased. He had waited for Cheng Poon to be away from Pykett Avenue. Whilst Cheng Poon was in Thailand, Lim explained the 1989 deed to the deceased. The deceased wanted a

second opinion. He did not know that the deceased asked Hamid to get a second opinion.

The three brothers met in Singapore as some of them were accompanying the deceased. The three brothers agreed that they would share equally the estate of the deceased. Cheng Hum who was not invited was not present. Liang Imm was also not invited. Cheng Bok refused to believe the 1989 deed would leave them (Cheng Bok and Cheng Liat) with nothing. He, Cheng Bok and Cheng Poon accompanied the deceased to Nik Saghir's office. The three brothers were not at Nik Saghir's office to watch over the deceased and each other and they were not at the E & O Hotel to check on each other.

In 1991, the deceased was a healthy man. He was fair and not easily swayed or influenced. He was very close to his 'secretary', a Thai girl in her twenties who was the deceased's companion. Between beginning of 1990 to about mid-1991, she was living in Pykett Avenue. The deceased was influenced by that Thai girl. Those around the deceased — Cheng Poon, Richard and Howard — could influence the deceased. He and Cheng Bok did not have any influence over the deceased.

He was only aware of the deceased's letter DB1(B)(9) restraining him from Pykett Avenue after the death of the deceased. DB1(B)(9) was written because Cheng Poon and the Thai girl had poisoned the deceased's mind that he (Cheng Liat) was poisoning the deceased's drinking water. He (Cheng Liat) did not believe that the deceased would have written DB1(B)(9). The deceased never said to him that he was not permitted to enter Pykett Avenue. He did not think that the deceased was capable of accusing him of poisoning the deceased's drinking water.

Prior to the instant proceedings, he had no knowledge of the will dated 27 December 1987. After the death of the deceased, he got to know of the 1990 wills. Initially, he did not know that Hamid arranged the execution of the 1990 wills. About four or five months after the death of the deceased, and after reading the 1990 wills, he got to know that Hamid was a witness. From Hamid, he got to know that Hamid arranged the execution of the 1990 wills.

Cheng Liat disagreed with Mr Yeoh's suggestion that Hamid arranged the execution of the 1990 wills at the behest of the three sons. He did not inherit any property from his mother but he got a small inheritance from his paternal grandmother — an undivided share in a piece of land that has not been distributed to him. Whilst he was working, he did not receive an allowance from the deceased. After retiring and whilst in Penang, he was receiving a monthly allowance of RM500, from the beginning of 1989 until July 1992 when he received interest on his RM866,000.

His trip to London with the deceased was after the meeting at the E & O Hotel. Hamid, Cheng Poon and the Thai girl were also on that trip. Cheng Poon and Hamid flew from London to the US to conclude a sale of the deceased's properties in the US.

In 1990, the deceased was still strong in will, but Cheng Poon had influence over the deceased. Cheng Poon and his sons were instrumental

in forging the 1989 deed. After he explained the 1989 deed, the deceased was angry. He did not know whether the deceased understood the effect of the 1989 deed prior to his explanation. If he had accompanied the deceased to hospitals, it was on occasions when the deceased consulted his doctors and when he was asked to. He did not know that the deceased was seeing his doctor, on 10 March 1990, for certification on the soundness of his mind.

Cheng Liat admitted he received a cheque for RM80,000. But that cheque, he said, was given to him by Cheng Hum who had just sold his Ayer Itam lands. He did not know that Cheng Hum paid out RM130,000 at the insistence of the deceased. He disagreed that Cheng Poon influenced the deceased or secured Hamid to influence the deceased into signing the 1990 wills. Cheng Liat said that from what he knew, Cheng Poon did not know of the 1990 wills until Cheng Poon opened the deceased's safe. Hamid told him that no one knew of the 1990 wills. He did not know of the execution of the 1990 wills. He denied that they (Cheng Poon, Cheng Bok and Cheng Liat) had struck a bargain and that he instituted the action because Cheng Poon had broken his word on the 1990 wills.

In re-examination, Cheng Liat clarified that the RM15,000 was not a loan from Bok Eng but his share from the sale of Lot 44 Bandar Jelutong. Under further cross-examination by Mr Koh, Cheng Liat said that he could have received both RM14,000 and a further RM15,000.

Richard, a young man of 34, testified that he is the Managing Director of Khaw Bian Cheng Sdn Bhd. and the eldest grandson of the deceased. Howard is his younger brother. Between 1984 to May 1990, he was studying overseas. In May 1990, he graduated with a degree in finance from the University of Houston. On 23 January 1992, he was made the Managing Director of Khaw Bian Cheng Sdn Bhd. The deceased appointed him a trustee of Cheng Been and 'Poh Guat Keong', a private temple.

The deceased was a strict man. He maintained a distance from his children and employees. However, the deceased was more open with his grandchildren. The deceased was a man of his word. For a short duration, between 1984 to 1986, Teik Lim and Gim Hong also stayed at Pykett Avenue. The deceased preferred his grandchildren to look after him. The deceased was short sighted. In June 1992, the deceased donated RM100,000 to the Chinese Recreation Club Building Fund. Liang Imm's husband was then the President of the club. Joo Chie or Sim Bee donated to the original building fund. The deceased had plans to develop Pykett Avenue. The assets of the deceased's wife were disclosed in the deceased's application for administration. Everyone had access to Pykett Avenue. During the day, the gate and house were not locked. Cheng Bok had access to the house. In 1993, Cheng Bok stayed for 16 days in Pykett Avenue. He could give a list of the things in Pykett Avenue on 10 April 1993 and a list of the personal belongings of the deceased.

In June 1992, he did not instruct Beng Tatt to prepare cheques for large sums to be signed by the deceased. It was not true that he, his father and Howard instructed Beng Tatt, between May to July 1992, to prepare

A cheques for large sums. In 1991, the deceased was desperate for cash; he wanted cash to travel, to spend and primarily to settle his overdraft. The deceased instructed Hamid to obtain buyers for his properties, including the Teluk Bahang land.

He was receiving a weekly allowance of RM50. Whilst studying overseas, B he was receiving US1,000. Upon his return, in 1990, he was receiving a weekly allowance of RM50. Whilst the deceased was alive, he was not receiving any salary as the Managing Director of Khaw Bian Cheng Sdn Bhd, nor having a job.

Between 3 August 1992 to 7 August 1992, he was not in Penang. On C 3 August 1992, he was staying at the Kuala Lumpur Hilton. He came back on 7 August 1992. He had no idea that the deceased was signing a will. On 1 August 1992, he was in Penang. Howard did not say to him that he (Howard) was preparing wills. Dr Gafoor and Beng Tatt were mistaken; on 3 August 1992, he was not in Pykett Avenue. Beng Tatt informed him, a few days after 7 August 1992, when he was at Pykett Avenue, that the D 1992 wills had been returned with Dr Gafoor's rubber stamp. Saying it was late, Beng Tatt suggested the deposit of the 1992 wills in the safe. That was the first time he got to know of the 1992 wills. He did not see the 1992 wills. He only got to see the 1992 wills when Lim read the 1992 wills.

Sometime in January 1994, Cheng Bok brought a copy of the second E Thai will (D11) to Pykett Avenue. Waving D11, Cheng Bok said to him that he (Cheng Bok) had proof that the 1992 wills were not proper. Cheng Bok threw D11 on the table. The pencil marks on D11 were present when he received D11.

Only the deceased had a set of keys to the safe. Beng Tatt was wrong when he said that he (Richard) had a set of keys. Sometimes, the deceased F would ask him (Richard) to open the safe. When Beng Tatt wanted to deposit the 1992 wills in the safe, they saw the deceased. The deceased handed him the safe keys. He opened the safe and Beng Tatt deposited an envelope in the safe. He locked the safe and returned the keys to the deceased. That was the last he saw of that envelope. He never touched that G envelope. He never open the safe by himself. He would only open it in Beng Tatt's presence. The deceased would not give the safe keys to Beng Tatt. It was not true that Howard and him took the safe keys from Beng Tatt. There were valuables in the safe — cash, jewellery, stocks and shares.

The deceased sold his wife's jewellery. The deceased handed the H jewellery to his mother to sell for him. The deceased disliked jewellery and never wore rings or watches. His passion was cars. Sometime in early 1992, the deceased purchased a Rolls-Royce, registered it in his father's name and gave the Rolls-Royce to his father. After the purchase of the Rolls-D Royce, the deceased asked his father to transfer a Mercedes 380 SEL to his father. He did not arrange the purchase of the Rolls-Royce and I did not receive a sales commission. Sometime in 1990/1991, the deceased purchased a BMW (CU8) and registered it in his name.

Beng Tatt was protective of the deceased's accounts. The office was Say Bee and Beng Tatt's domain. They answered to the deceased. After

the death of the deceased, Beng Tatt continued to keep the accounts and Say Bee continued to collect rent for the estate. Beng Tatt had the accounts under lock and key. He (Richard) was never given a set of keys. A

It was not true that he and Howard asked Hamid to do something to the 1990 wills. Hamid visited the deceased after the deceased was discharged from the LWE Hospital. On the first occasion, on the instructions of the deceased, he told Hamid that the deceased was sleeping. On another occasion, the deceased told him to tell Hamid he was in the toilet. On the third occasion, Hamid walked directly to the deceased. The deceased was reading his newspapers. Hamid greeted the deceased. The deceased did not respond. The deceased was still upset with Hamid for failing to introduce an architect to prepare the development plans for Pykett Avenue. The deceased waited three days in Kuala Lumpur for the architect. That was before the deceased was admitted to the LWE Hospital. Because the sale of the Teluk Bahang land was not concluded, Hamid is taking it out on him, his father and brother. B C

He was in Singapore when the deceased was treated in Singapore. Before the deceased passed away, the deceased was in a coma for 24 hours. A day before the deceased passed away, his father withdrew RM140,000 from the deceased's account. D

The deceased was angry that Cheng Bok had charged the land he (the deceased) purchased for Cheng Bok. After the death of the deceased, Cheng Bok had not been Aback to Pykett Avenue, even for prayers. E

Between April to December 1993, the estate advanced RM10,000 and his mother advanced RM15,000 to Cheng Liat. He advanced RM6,000 to Cheng Been and RM10,000 to Khaw Bian Cheng Sdn Bhd. He made those advances after the death of the deceased. Cheng Bok, his father, Howard and himself, as trustees of the estate, opened an account at the Standard Chartered Bank; a sum of RM130,000 was deposited. A sum of RM40,000 was owing to the Standard Chartered Bank. His fixed deposits pledged as security had been uplifted by the bank. The RM140,000 his father took had been accounted for. The balance, (RM38,274) had been transferred to the trustees' account. Cheng Bok's testimony that he had not signed any of the cheques in that trustees' account was not true. F G

Tendering the original MOUs with Gloria Bay — 29(A and B) — Richard testified that Cheng Bok and Cheng Liat instigated Howard to burn the MOUs. Cheng Liat said that all their problems would be solved if the MOUs were handed to Ismail Khoo & Co. Cheng Liat wanted to give the development of Pykett Avenue to Gloria Bay Sdn Bhd. He (Richard) did not want to proceed with that MOU as it was not in the best interests of the estate. Several parties, including one Tan Chiew Hun, invited him to sell Pykett Avenue. In 1994, Gloria Bay, supported by Teik Lim's declaration, caveated Pykett Avenue. H

Sometime in 1994, Cheng Bok withdrew his consent for the grant of administration of the estate of the deceased in Thailand. At that time, they had not applied for probate in Malaysia. He proceeded with the application for probate of the Thai estate, as the position of the estate in Thailand was I

A precarious. With regard to the US estate, Howard was the sole administrator.

Bian Cheng Naranong, Wife, Relatives and Friends Ltd (Thai company) is the owner of the properties listed in the 1992 Thai will. He is one of the directors. The other directors were his father, the Thai manager and Cheng Liat. The shareholders are those named in the 1992 Thai will. He
B is presently in charge of the company. The trustees (of the 1992 wills) passed a resolution to pay him a salary of RM2,500 per month. He did not agree with Cheng Bok's suggestion to sell the Thai properties en bloc; that would be against the will and would not fetch a good price.

He did not dictate the letter/instruction dated 11 February 1993 —
C PB2(5). He took legal advice and was advised not to entertain the respective claims of Cheng Bok and Cheng Liat for the said RM826,000 and RM866,000. He told Cheng Bok and Cheng Liat to apply to court. He believed those payments must be made in accordance with the terms of the settlement dated 24 July 1992.

He lived his life with the deceased. The deceased did not give him any
D land. The deceased gave a property in America — known as Marion Oaks — to Teik Lim. He is one of the eight or ten trustees of the Poh Guat Keong Temple. Teik Lim is a trustee. He did not know why the deceased gave a property in America to Teik Lim.

Richard's testimony, under cross-examination by Mr Khoo, was as
E follows. Apart from being a trustee for Cheng Been, a trustee of the estate and a managing director of Khaw Bian Cheng Sdn Bhd, he has no other job. Apart from the RM50 weekly allowance from the deceased, he had no other income. He had RM20,000 in his account. He was 21 when his mother left Pykett Avenue in 1984; he was not raised by servants. Until the death of the deceased, he had his meals with the deceased. In 1990, 1991
F and 1992, he was in the house most of the time. In 1992, after prostate surgery, the deceased was urinating blood. He had no knowledge that the deceased was suffering from Parkinson's disease. The deceased complained of palpitation. Other than in July 1992, and when the deceased was at LWE Hospital and suffering a loss of memory, the deceased was not
G senile. The deceased was normal. He did not see the deceased having seizures in 1992. He visited the deceased at LWE Hospital. The deceased was disorientated; sometimes, the deceased would be talking but he could not make out what the deceased was saying. The deceased, when he was discharged in July 1992, was weak and had to be supported.

H On the night of 1 August 1992, he did not see Beng Tatt. The safe was not opened. He did not know why the deceased had not asked him to amend his wills. He had no knowledge of the amendments to the 1990 wills. On 3 August 1992, he was having a business meeting in Kuala Lumpur. He was not informed that the deceased had executed a will on 3 August 1992. He got to know of the 1992 wills when Beng Tatt asked
I him to get the safe keys. He was surprised that a will had been executed. His father did not inform him of the 1992 wills. He might have spoken to his father on the 1992 wills but he could not remember if it was spoken in detail. His father did not say to him who prepared the 1992 wills. He could

not remember when he found out that Howard prepared the 1992 wills. He did not prepare 2D — the second 1992 Thai will. He did not amend the 1992 wills for Dr Gafoor's signature. He had access to Howard's room and use of Howard's laptop computer.

His mother purchased an apartment in Singapore. The price was S$450,000 to S$460,000. It was partly financed. He knew, in July 1992, that his family was receiving large sums of money from the deceased. The deceased left RM14,000 The deceased spent all the RM7m he received from the sale of the Batu Ferringhi land. In June and July 1992, his family received more than RM3.2m from the deceased. On 31 March 1995, consolidating the account of the estate in Thailand and the account of the Thai company, the deceased had RM174,649.01; he could not provide the Thai accounts as at the date of death of the deceased. He did not know he had to provide such an account. Money from Thailand was sent by the Thai manager who approved the payments. He forwarded US$6,000 from the Malaysian estate to the US estate. After the death of the deceased, the Thai manager who was his sailing partner and a family friend visited him several times. After the appointment of the receiver and manager, the Thai manager only visited him once.

For the past four years, he had not shown the accounts of the Thai company to any of the plaintiffs. Letters were sent to the plaintiffs to attend the Annual General Meetings of the Thai company. From April 1996, as managing director of the Thai company, he was receiving Baht40,000 per month. It was not approved by the company. He had not informed the plaintiffs of the Baht40,000 he was 'taking'. He knew he had to have the approval of the company. From 1993 to 1995, he did claim expenses from the Thai company, although he claimed, in 1996, for a few thousand dollars expenses. He took the Baht40,000 from the company.

There is an ancestral house, in Kantang, Trang, Thailand, the house of Khaw Sim Bee, that belonged to the deceased. During his lifetime, the deceased converted it into a museum. The deceased had no movable property nor bank account in Thailand. It was not true that the deceased had a lot of money in Thailand. Despite the appointment of the receiver and manager, he remained as the managing director to maintain the Malaysian and Thai companies. He had not held any meetings in Thailand. He just continued to collect rent and to pay the staff. The Thai manager, a director, got his salary from the estate in Thailand. The Thai manager resigned in April 1996. When the deceased passed away, the Thai manager brought money with him from Thailand to Singapore.

In 1994, he could not stop the petition for administration in Thailand as the situation in 1994 was not different from 1993. The lands in Thailand were yet in a precarious situation. Richard agreed that the plaintiffs applied, in 22–271–94, to restrain his application for probate in Thailand. He agreed that the first to third defendants had not disclosed, in 22–271–94, that the petition for probate in Thailand was yet proceeding. He agreed that the Kantang Provincial Court, in January 1995, had turned down the first to third defendants' petition for probate. He did not inform the other

beneficiaries of the decision of the Kantang Provincial Court as he and the other beneficiaries were not on speaking terms. He did not inform the other beneficiaries of the first to third defendants' appeal against the decision of the Kantang Provincial Court. Despite objections, the first to third defendants proceeded with their petition and appeal, as they believed it was in the interest of the estate. The first to third defendants wanted to save the Thai properties for all beneficiaries. The properties in Thailand, because of Thai laws (on the inheritance of Thai properties by non-Thai beneficiaries), were in a precarious position. The Thai court was informed of Cheng Bok's objection. The first to third defendants did not inform the Thai court of the plaintiffs' actions in Malaysia. He did not see it fit, at any time, to inform the Thai courts of the plaintiffs' actions in Malaysia or to disclose to the Malaysian courts of the petition in Thailand. He has not renounced the Thai probate. He denied that he attempted to dispose off Pykett Avenue and then leave Malaysia. He said that Khaw Bian Cheng Sdn Bhd had no intention of selling Pykett Avenue. He did not inform the plaintiffs of the tenancy agreement with Glashaus Sdn Bhd. Even during the lifetime of the deceased, Glashaus was using Pykett Avenue. The plaintiffs complained that Glashaus was using Pykett Avenue free of rent; he suggested to Glashaus to pay rentals. A cook, driver and maid are employed by the estate. The deceased's wills provided so. They were former employees of the deceased and he continued their employment. They are not working for Glashaus.

The deceased was in Singapore for six weeks; he was treated at the Singapore General Hospital. The plaintiffs were not informed that the deceased was in Singapore as the deceased had instructed that they should not be informed. In February 1993, at LWE Hospital, the deceased was diagnosed as suffering from an advanced stage of cancer of the prostate. The deceased, aware in February 1993 that he was suffering from cancer, decided to seek treatment at the Singapore General Hospital; he was given radiotherapy treatment. The deceased was well in Singapore. Only in the last few days, was the deceased not well.

The deceased was a very unforgiving man. It did not strike him (Richard) as strange that the deceased would not want his children and other grandchildren by his side even as he was nearing his death. He denied he and his family kept the other members of the Khaw family away from the deceased as they were afraid that the others would raise the issue of the wills of the deceased.

His family disposed off their cars, although after suit 22–299–95 was filed, to raise money; it was not to avoid the recovery action. He agreed that he sold the BMW, in early 1994, after he received PB1(96) — Cheng Bok's solicitors' letter to Richard enquiring, inter alia, whether the BMW was the property of the estate — but before 22–299–95 was instituted. The Toyota Estima, purchased in 1991, was sold in 1994, as his family could not afford the instalments; his mother paid the instalments after the deceased passed away. The Ladybird, purchased with his father's own funds, had been sold. The Porsche, purchased in September 1992, is still

with the family; the deceased paid the down payment (RM50,000) whilst his father paid the balance (RM180,000). Howard purchased a Mercedes SL with the RM350,000 given him by the deceased. A

He agreed that the deceased intended that Lot 44 Bandar Jelutong and the two houses on it should be for the benefit of the Poh Guat Keong Temple. On one occasion, with Howard, he met Douglas Newman; they discussed the US properties. They discussed the Malaysian position with Lebeau as they had received the plaintiff's notice. He did not respond to DB1A (190) — Cheng Bok's letter dated 22 December 1993 on the MOU — but he spoke to Cheng Bok in Singapore. B

Richard testified that he was aware that the 'Koe Guan Kong Lim' trust set up by an ancestor was about to be wound up and that its assets would be distributed to all surviving descendants with the generation name 'Cheng' and 'Teik'. However, he could not remember whether he had claimed his interest from the 'Koe Guan Kong Lim' trust. He did not know the value or quantity of jewellery in the deceased's safe. Rental from Thai properties was about Baht150,000 per month. C D

Richard's testimony, under Mr Yeoh's cross-examination, was as follows. The deceased was more fond of his grandchildren and talked more to them than his children. His sister, and also Gim Hong when she was in Penang, took care of his grandmother. There were maids and servants, but most of the time only granddaughters attended to her. Towards the later stages of her life, a maid was constantly with her. He and Howard attended to her on isolated occasions. The deceased was physically active and more independent and did not require constant attention. He found the deceased, when he was home between 1984 to 1990, to be healthy. When his grandmother was hospitalised, the deceased was also admitted with her. Richard believed that the deceased was admitted for a 'sympathetic' and not 'real illness'; the doctors found nothing wrong with him. It was like a holiday for the deceased. He was aware that the deceased, before admission to LWE Hospital, was suffering from palpitation and an enlarged prostate. He was not aware of the medication given to the deceased or that the deceased was suffering from Parkinson's disease. In 1989, the deceased could walk unaided. But he (the deceased) preferred to hold on to someone. E F G

He was in the house when the deceased asked Hamid to sell his properties, including the Ayer Itam land that he jointly owned with Cheng Hum. Hamid informed the deceased that Cheng Hum had no wish to sell the Ayer Itam land at the offer price of RM4psf, as Cheng Hum believed the value was about to rise to RM20psf. The deceased remarked that he could not wait for the price to rise to RM20psf, and the deceased suggested that Cheng Hum should buy up his interest, if the value would rise to RM20 psf. H

Richard denied that his family, rather than the deceased, could not wait for the land value to rise. In 1991 to 1992, the deceased was desperate for cash to buy cars and to meet his expenses and overdraft. Richard said that he had no idea of the state of the deceased's overdraft. He explained I

that he testified that the deceased, in 1990, wanted to enjoy his money as the deceased was traveling a lot, eating out and entertaining. He did not hear from the deceased that he (the deceased) was desperate for money. He supposed it was so as the deceased had asked Hamid to sell his assets.

He was not in a position to know the amount of his grandmother's jewellery. Shortly after his grandmother's death, the deceased sold some of that jewellery. He did not know why the deceased sold some of that jewellery. The deceased asked his mother, in 1989 or 1990, to sell that jewellery. He did not know why the deceased asked his mother, but no one else, to sell his wife's jewellery. 'Perhaps (she) was there.' Richard did not agree that the deceased had not asked his mother to sell the jewellery. Richard denied he invented the sale of his grandmother's jewellery as his family could not account for the jewellery in the house.

Richard related that the deceased asked his mother, just before his grandmother passed away, to visit his grandmother, as the deceased wanted them to reconcile.

Richard testified that the deceased always had 'a string of cars'. 'The deceased would have, at the very least, three cars at any point in time'. The deceased always had a beautiful sedan and other cars for his daily use. In 1988, the deceased had a Mercedes Benz E280 and a Mercedes Benz 380. 'The deceased purchased the Rolls-Royce in 1991 or early 1992.' The Mercedes Benz transferred to Cheng Bok was purchased in 1988 or 1989. His father purchased a Nissan Fairlady sports car in July 1992. The Porsche was purchased in September 1992. 'The deceased continued to have a passion for cars until death.' 'The deceased loved sitting in the Rolls-Royce.'

> Mr Yeoh: How could he indulge in his passion ... when (it was) not registered in his name?.
>
> Richard: He need not have to have the cars registered in his name to enjoy it.

In 1991 and 1992, the deceased had prostate surgery. The deceased had seizures when he was admitted to LWE Hospital in July 1992. After he was discharged, the deceased maintained his passion for cars and traveled to China and the US. Shortly before he died, the deceased planned to travel to Europe to buy the latest Mercedes 600.

He knew of the 1990 wills in late 1990 or early 1991. Hamid mentioned those wills to him. Richard denied that he and Howard propositioned Hamid 'to do something about the 1990 wills'. Richard testified that Hamid testified he and Richard propositioned Hamid to do something about the 1990 wills as the sale of the Teluk Bahang land was aborted, in June 1992, and Hamid is trying to get back on the first to third defendants.

His first sight of the 1990 wills could have been after his grandfather had passed away. Richard denied that Hamid delivered a copy of the 1990 wills, shortly after the deceased was discharged from the LWE Hospital, to Pykett Avenue. Beng Tatt did not go directly to the deceased for the safe keys, as Beng Tatt might have already asked the deceased, and the deceased

could have asked Beng Tatt, normally the case, to look for him; the deceased would not trouble himself to come down and open the safe for Beng Tatt. Richard denied he took the safe keys from Beng Tatt. Richard said, he was surprised to find, when he was back on 7 August 1992, that his grandfather had made a fresh will.

Lim who read the 1992 wills, a few days after the burial, to Cheng Bok, Cheng Liat and the first to third defendants, was instructed, after the 1992 wills were read, by all those present to prepare the application for probate. His uncles were especially anxious to rush the application for probate.

The deceased and his father, as the directors, appointed him the Managing Director of Khaw Bian Cheng Sdn Bhd. Whilst the deceased was alive, he was not given and he did not ask for a salary. His salary from Khaw Bian Cheng Sdn Bhd was only paid for a few months. The directors of Khaw Bian Cheng Sdn Bhd are his father and himself. The deceased had 1,999,999 shares in Khaw Bian Cheng Sdn Bhd. The remaining one share is held by his father. The deceased did not transfer nor allot any shares in Khaw Bian Cheng Sdn Bhd to his other children or grandchildren.

In April 1994, after the resignation of the Thai manager, he took charge of the Thai company. He signed the tax return for 1995 for the Thai company. The Thai manager signed the tax returns for 1993 and 1994. The Thai manager consulted him before he signed those tax returns. He had instructed the Thai manager to maintain the estate in Thailand. The directors of the Thai company were the deceased, his father, Cheng Liat, the Thai manager and himself. The 13 shareholders are those in D31(1–4). The present directors are his father, Howard, himself, his sister, Cheng Liat and the Thai manager. There was no meeting to appoint those additional directors. His father appointed his sister and Howard as additional directors. He did not inform the other beneficiaries of the appointment of the additional directors.

Richard offered no answer when he was asked, 'so, your family did as it pleased'. Richard testified that he gave an account of the rentals received from the Thai estate to the receiver and manager. All 146 (land) titles of the Thai properties are with the Thai manager. He (Richard) would hand over all those 146 titles to the receiver and manager. All those 146 properties, Richard declared, have not been sold, charged or pledged. They are intact.

In re-examination, Richard clarified as follows. The deceased had palpitation of the stomach. RM26,927.88 was an accounting figure after deducting the overdraft. The deceased had more than RM250,000 cash. PB1(135) was the balance sheet on the cash position at the date of death of the deceased. PB1(138) was the balance sheet on the cash position as at 31 March 1995. The estate's cash position, between 10 April 1993 to 31 May 1995, was down by approximately RM100,000; there was more expenditure than income. The deceased instructed the Thai manager, about a week or two before he passed away, to bring Baht230,000 to Singapore. The deceased wanted money for his expenses. The Thai manager brought that money a day after the the deceased passed away.

Richard further clarified his family received RM2.7m and not RM3.2m, in the months of June and July 1992. Of that RM2.7m, RM512,063.70 was to settle the overdraft owing by the deceased and his father to the BBMB, Georgetown. The advance of US6,000, from Thailand to the US estate, was made by the Thai manager. The Malaysian estate advanced US$37,021.44 to the US estate; Cheng Bok also signed the cheque for the Malaysian advance. He did not inform the beneficiaries of the application for probate in Thailand as he believed they would sabotage the application so as to put the entire Thai estate in jeopardy, as they would prefer to 'stop everything than to secure the position of the (Thai) estate'. He informed the Kantang Provincial Court that Cheng Bok had withdrawn his consent. Glashaus was paying, even before the execution of the tenancy agreement, a monthly rental of RM1,000. Richard explained that the deceased was an unforgiving man as he remembered the deceased saying to Cheng Bok that he (the deceased) might have forgiven but he has not forgotten. He was present when Cheng Bok came back to Pykett Avenue, after years of absence, and prostrated himself before the deceased and asked for forgiveness. The deceased had arranged a Thai bride for Cheng Bok but Cheng Bok ran away with someone else. Thereafter, Cheng Bok was away from Pykett Avenue for ten years. Cheng Bok had asked for his ½ share of the rent received from premises 165–173A Jalan Dato Keramat. The deceased had refused to pay Cheng Bok's half share. When their differences were resolved, the deceased paid Cheng Bok. The deceased bought over Cheng Bok's half interest. Howard bought a Mercedes with part of the RM350,000 that the deceased had given Howard. The deceased was happy that he was driven in the US in the Mercedes by Howard. The deceased was only urinating blood after the prostate operation. The deceased said that it was due to the operation. The bleeding which had stopped started again at about the time that cancer was diagnosed. The deceased recovered very quickly, after he was discharged from LWE Hospital.

Howard's evidence in chief may be paraphrased as follows. Between 1989 to1992, he was a student in the US. Between 5 June 1992 to 5 August 1992, during the term holidays, he was in Malaysia. Whilst he was home, the deceased suffered a seizure on 12 July 1992 and executed the 1992 wills.

He and Richard were very close to the deceased. The deceased was the focal point of his family. The deceased provided his family financially and emotionally. He regarded the deceased highly. The deceased, who found ease communicating with him, had a particular liking for him.

After dinner, on 1 August 1992, the deceased communicated to him that he (the deceased) wanted him (Howard) to retype his wills. Before that, he was not aware of the will of the deceased. The deceased made corrections on the 1990 wills and told him (Howard) to follow his (the deceased) corrections. The deceased handed him the corrected 1990 wills — one set of the Thai, Malaysian and US wills — whilst they were upstairs, along the corridor. He could not recall whether the corrections were made on the originals or copies of the 1990 wills. The deceased told him that he (the deceased) wanted the retyped wills on the following day.

That evening, he (Howard) read the 1990 wills for the first time. He started to retype the wills on 2 August 1992. Close to dinner time, he finished his task. In the evening (2 August 1992), he returned the corrected 1990 wills and handed the retyped wills to the deceased. Each retyped will was held together with a paper clip.

His friend, Patricia Lim, who visited him on 2 August 1992, arrived at about dinner time. By then, he had already retyped the wills. Patricia had nothing to do with the preparation of the wills. It was not true he asked Beng Tatt for the safe keys or that he took those keys from Beng Tatt, on 1 August 1992. He never saw nor spoke to Beng Tatt in the evening of 1 August 1992. He (Howard) had nothing to do with the safe in the house.

He was instructed to remain in the house on 3 August 1992. He waited for the deceased's instructions. Late in the morning, the deceased said to him that he (the deceased) wanted him (Howard) to accompany him (the deceased) to the hospital. Together with his parents, He accompanied the deceased to the LWE Hospital. He was present when Dr Tan Chee Khuan examined the deceased. He believed his father was also in the consultation room. They returned home for lunch. After lunch, the deceased read his newspapers and had an afternoon nap.

Around 4pm, Lim and Dr Gafoor came to the house. First to arrive was Lim. He was then in his room, upstairs. Hearing voices and steps on the stairs, he came out and saw Lim being accompanied by Beng Tatt. The deceased walked out from his room. Then both the deceased and Lim walked to the main table. They sat down. He did not sit down with them. Beng Tatt proceeded downstairs, to wait for Dr Gafoor.

Placed neatly on the table were the wills he gave the deceased on 2 August 1992. The wills looked to be in the same condition as he had given it. He did not know who placed those wills on the table. Dr Gafoor arrived about 10 to 15 minutes after Lim. Beng Tatt accompanied Dr Gafoor upstairs. Dr Gafoor took his seat at the main table. Beng Tatt was standing at the top of the stairs. He (Howard) did not join the meeting. He adjourned to his room. He had no idea who arranged the meeting. The deceased instructed Beng Tatt to ask a servant to serve drinks to Dr Gafoor and Lim. Beng Tatt proceeded downstairs.

Lim, after reading the wills, pointed out to the deceased that there was one trustee too many. The deceased instructed him (Howard) to correct the wills, deleting Teik Lim as a trustee. He collected the three sets of wills and proceeded to his room to make the corrections. He replaced the top page. He brought out the 1992 Thai will ([D2B) held together with a paper clip. At that moment, his father was around, signing some documents.

He first amended the Thai will. After that, he returned to his room and corrected the next will. Lim read aloud the 1992 Thai will. The deceased held the 1992 Thai will. He (Howard) only prepared one Thai, one Malaysian and one US will. No duplicates or copies were prepared.

He placed the 1992 Thai will on the table. He stood about 15 feet away. Lim proceeded to read aloud the 1992 Thai will. The 1992 Thai will

was then handed to the deceased who read it himself. The deceased signed somewhere towards the end of the page. The 1992 Thai will was stapled when it was signed. After the deceased signed the attestation page — D2B(9) — Lim signed and handed D2B(9) to the deceased. He (Howard) then returned to his room to correct the next will. He brought out the next will, duly corrected; at the table, he stapled that will and placed it on the table. Then, Lim proceeded to read that will. He then returned to his room to correct the third will. He brought out the third will, duly corrected, and left it on the table. He saw the deceased, Lim and Dr Gafoor signing the next two wills. He (Howard) prepared all of the 1992 wills. All of the 1992 wills were stapled when it was signed. He stapled those 1992 wills. He did not see the particular pages of the Malaysian and US wills that the deceased, Lim and Dr Gafoor were signing. On 3 August 1992, the deceased was his usual self. He saw Lim and Dr Gafoor signing the other pages of the 1992 Thai will. He believed the attestation page — D2B(9) — was the first page that was signed. As for the signatures on the other pages, the deceased signed a page, and then the subscribers signed that page and handed that page to the deceased. After that, the deceased signed the next page and then the subscribers signed that page and handed that page to the deceased, and so on. The same procedure — the deceased signing a page and then the subscribers signing that page and then handing that page to the deceased — was replicated in the execution of the other two wills.

The persons in the upstairs hall, from the moment both Lim and Dr Gafoor had arrived until completion of the execution of the 1992 wills, were the deceased, Lim, Dr Gafoor and himself. His father, signing some documents, was only there for a short while. Beng Tatt was there fleetingly; he stood at the top of the stairs and was asked to bring a stapler upstairs. Lim and Dr Gafoor left at about 6pm. As Lim and Dr Gafoor were leaving, he heard Lim reminding Dr Gafoor that he (Lim) would be sending the 1992 wills to Dr Gafoor for Dr Gafoor's rubber stamp.

Richard left for Kuala Lumpur on 3 August 1992. He (Howard) left for the US on 5 August 1992. He did not prepare the second Thai will — 2D. On 4 September 1992, he was not in Malaysia. He had not taken Beng Tatt's cabinet keys and he did not have a set of keys to the cabinet that Beng Tatt opened. Howard denied he had ever instructed Beng Tatt to hand all important documents to his father and Richard for inspection. He denied he instructed Beng Tatt on the figures in DB1D(347–348) — handwritten notes on the RM826,000 and RM866,000 payable to Cheng Bok and Cheng Liat from the sale of the Batu Ferringhi land. He and Richard had not propositioned Hamid to change the 1990 wills. There was no such visit to Hamid. He denied he asked Beng Tatt, after 22–63–95 had been instituted, to sign a false declaration.

In June 1992 or thereabout, he received RM352,000 from the deceased. A significant part was for his schooling fund. The rest was for a car. The schooling fund, so long as he could finish his education, was not for any specific period. He endorsed a cheque for RM225,000 that the deceased gave him. He endorsed the cheque but the sum was paid to Tan Beng Hin.

After he endorsed the cheque, the deceased took the cheque from him. Each time he needed money, he approached the deceased. The deceased approved and instructed all payments made to him. He did not instruct the payments in his favour. He denied he threatened Cheng Bok that his family would leave nothing to Cheng Bok. He denied he invited Cheng Bok to sue him in the US. He did not threaten Cheng Liat that the first to third defendants would dispose off all the estate property. Cheng Bok never asked him to be photographed with the body of the deceased. He was not consulted on the funeral arrangements.

The MOU with Gloria Bay, when it was burned, was not signed by all parties. The first MOU was aborted and his father refused to sign the second MOU. Cheng Bok and Cheng Liat told him to burn the MOU. Cheng Bok and Cheng Liat insisted that the MOU be burned as John Khoo was harassing his father for the execution of the MOU by all parties. He turned down Sunny Ho's offer of a car to him for the completion of the MOU. It was not true that he burned the MOU because his request for RM500,000 and a Mercedes sports car was turned down.

In June or July 1992, he asked En Ismail of Messrs Nik Saghir for a copy of the agreement on the (proposed) sale of the Teluk Bahang land. He did not ask for a copy of the codicil/will signed in early 1990.

He is not gainfully employed as he has to finish his studies. He has temporarily stopped his studies. He was pursuing a degree in marketing and business administration at Parloma College, San Diego, California.

In Arizona and Florida, he was granted probate of the US estate. He retained the services of an attorney — Douglas Newman. He notified all interested parties that he was petitioning for probate in the US. Cheng Bok first consented and then withdrew his consent. One hundred acres of land in Benson, Arizona were sold to pay taxes. Approval for the sale was obtained on 19 April 1995. On 9 May 1995, he sold the Racquet Club condominium in Arizona. On 31 May 1995, the US court approved the sale of the condominium. On 25 May 1995, he received the injunction of the plaintiffs. He instructed Douglas Newman not to proceed with the sale. Despite his objection, Douglas Newman who advised that the estate could be sued concluded the sale.

All required parties agreed to his appointment as trustee of the deceased in the US. He engaged an accountant, Gary Hockman, to assist him. A sum of US$62,278.05, was paid on 30 August 1995 to the Inland Revenue Service. From the sale of the condominium, US$24,154.80 was paid directly to the Inland Revenue Service. DB1(F)(29) is a correct account of the properties in the US. The Benson land, purchased for US$100,000 and valued at US$110,000, was sold for US$125,000. He commissioned a valuation of the property before it was sold. After expenses, a net sum of US$107,478.76 was received from the sale of the Benson land. The Racquet Club condominium was sold for US$58,000. Arthur Anderson wrote to him, on 13 March 1996, for a detail account of the US estate. It was the only communication he received from Arthur Anderson. He directed Arthur Anderson to Douglas Newman.

A Under cross-examination by Mr Khoo, Howard testified that he was the favourite grandson of the deceased. Beginning June 1992, he was receiving large sums from the deceased. He received all sums stated in PB1(326–333). Between 17 June 92 to 29 June 1992, he received cheques totaling RM576,000 from the deceased; but he did not receive the said B RM225,000. Before then, he was only receiving RM50 a week.

In 1992, he was a student at the Parloma College. To date, he has not got sufficient points to graduate. Shortly after the death of the deceased, he stopped his studies. Howard denied he came back, in May 1992, to ensure his control of the estate and that he would be a trustee. He was home every six months. At home, he was often in the deceased's room. He C did not see the deceased having delusions. The maid woke him up on the first night that the deceased was having a seizure. That was the only time he saw the deceased having a seizure. After he was discharged, in July 1992, the deceased needed physical assistance; but he was maintaining normal hours for a man of his age.

D The deceased amended each set of the 1990 wills. He (Howard) read the 1990 wills on 1 August 1992. On that day, he got to know and he was happy that he was not a trustee under the 1990 wills. However, he saw his name in the amended 1990 wills. It was not true that he decided to change the 1990 wills — including himself as a trustee. It was incorrect that the E deceased was senile or that he (Howard) had opportunity to change the deceased's wills. It was incorrect, that he, after receiving RM579,000, was emboldened.

Mr Khoo: In 1990, the deceased made a will before a prominent lawyer. Was it not odd that you prepared the 1992 wills?

F Howard: I was the closest to him.

Richard is now occupying the deceased's room. After it was returned to the deceased, he had not seen the amendments to the 1990 wills. Richard did not prepare the 1990 wills. When he left Malaysia on 5 August 92, he was not aware of the second 1992 Thai will. He had no idea as to who prepared the second Thai will. It was the beginning of 1994 that he got to G know of the second 1992 Thai will. He did not investigate as no one was propounding the second 1992 Thai will. He only saw a copy (P11) of the second Thai will.

Howard did not agree (the evidence of Dr Gafoor) that the 1990 wills were signed in loose sheet form, that it was not read to the deceased or that H there was no mention of amendments. As far as he was aware, the deceased made no mistakes in his signatures. He was not asked to amend p 9 (attestation page) of the 1992 Thai will. Howard disagreed with Lim's testimony that the 1992 Thai wills were tampered. 'It was not tampered.' In 22–271–95, he affirmed an affidavit dated 13 April 1995.

I He was not aware of Keatseangslip's letter of 24 April 1990 — P12(1) — a proposal to the deceased on the exchange of the Benson land priced at US$1.6m for a retail center at Tucson, Arizona priced at US$2.95m, subject to the deceased's payment of the difference of US$1.35m. His

father who was aware of the sale of the Benson land never mentioned P12(1) to him. He was not told of that letter. He told his father that the Benson land was sold for US$125,000. Howard denied he sold the Benson land to lay his hands on the sale proceeds. A

He received US$43,021.44 from the Malaysia and Thai estates. PB1(141) was the account he provided the Malaysian estate. He took US$11,500 as salary. He could account for the US$237,000, approximately, in the US account, received from the sale of the Benson land and condominium and from the Malaysian and Thai estates. B

Howard said, he has no plans at the moment to emigrate to the States. He retained attorneys in the US to assist him in his plans to migrate to the States. He denied he charged his legal expenses to the estate. His mother's legal expenses in the States were not settled by the estate. He could not recall however whether Richard's legal expenses in the States were settled by the estate. It was not true that he planned, knowing his uncles had no means of following him, to dispose as much of the estate property as possible and run to the States. C D

After the death of the deceased, he consulted attorneys in the States to draft a private trust between his father, Richard and himself. That trust provided that his father's properties would devolve to Richard and himself. It was not true that Richard and himself had total control of their father.

He told his uncles, when they approached him for the RM826,000 and RM866,000, that they would have to apply to court to determine if the RM826,000 and RM866,000 were due to them. He had not asked Beng Tatt to change one item — 'funeral' to 'testamentary' expenses — in the Thai accounts. E

He was yet not appointed the representative of the US estate when he received Cheng Bok and Cheng Liat's notice of withdrawal of consent to his appointment. He received Cheng Bok's notice — PB1(84, 86) — of withdrawal of consent to his application for probate in Thailand before he was appointed administrator. During the proceedings, but not in the petition, he informed the US courts of Cheng Bok and Cheng Liat's notice of withdrawal of consent. He took heed of his uncles' protests, but he was advised to proceed with the petition in the States. 'Yes, my US attorney advised the petition to be halted. The proceedings were halted when the letter were received. Subsequently I received probate.' He has not renounced the probate granted him in Thailand and in the States. Douglas Newman was not his alter ego. F G H

He applied to the US courts for administration of the estate of Ooi Geen Peen in the States. He did inform the other beneficiaries. On 10 May 1995, he was appointed the administrator of the estate of Ooi Geen Peen. Ooi Geen Peen had no independent assets. Her properties were owned jointly with the deceased. When he disclosed the assets of the deceased in the States, he also disclosed the assets of Ooi Geen Peen. He had not mortgaged any of the deceased's properties in the States. When he received PB19(84 and 86), he had not obtained probate in Thailand. He did not I

stop the petition. On 25 January 1995, the Kantang Provincial Court refused the petition for probate. He did not inform the plaintiffs. On 1 September 1995, the decision of the Kantang Court, on appeal, was reversed. He proceeded with the petition in Thailand as he believed it was in the interest of the estate.

Mr Khoo: The excuse in the States was to pay taxes. What is the excuse for the petition, despite the protests of the plaintiffs, to proceed in Thailand?

Howard: No excuse my lord.

The Rolls Royce, Toyota Estima and Nissan 300 ZX in his father's name were sold by his father. The BMW in Richard's name was sold by Richard. He did not know whether those cars were sold after 22–299–95 was instituted.

A month after the death of the deceased, his family purchased a RM500,000 condominium — Horizon Towers, Tanjong Bungah. In 1994, his family purchased a luxury apartment in Singapore. His family has one other luxury apartment in Pulau Tikus, Georgetown. After the death of the deceased, he had not purchased any luxury cars. Prior to the death of the deceased, his family had not purchased any property.

To settle the US taxes, he saw it fit to sell the Benson land. Prior to the petition to the US court, Cheng Bok and Cheng Liat were not informed of the US taxes. The cause papers notified Cheng Bok and Cheng Liat of the US taxes. He did not seek the assistance of the other beneficiaries to pay the US taxes.

He was aware of the proposed sale of Pykett Avenue to Dragon & Phoenix Sdn Bhd for about RM16m. He was involved in the negotiations. He was also involved in the negotiations on the joint venture development of Pykett Avenue. He tried to sell Pykett Avenue to one Alex Tan of South Johore Oil Mills. After he was served with the injunction, he was trying to get offers from prospective buyers. But Howard denied he was dealing with the estates's assets. There was no intention to enter into an agreement. It was not true that he took RM500,000 from one Alex Tan. The funeral arrangements were mainly handled by his mother. The funeral expenses were those stated in PB1(136).

Mr Khoo: You (are) not providing the receipts and original documents complying with the consent order dated 8 April 1996, as you, the person who drafted the 1992 wills, (is) aware that if you disclose the documents you will expose yourself and the first and second defendants to the penalty in (the) 1992 wills — that anyone not complying with the direction on funeral expenses would be cut off from the deceased's will?.

Howard: That is untrue.

He did not know whether a number of telephone calls [see PB4(11–126)] were made to Thailand. 'Yes, the Thai manager called upon the first defendant at Pykett Avenue. Yes, a few months ago he called upon the first defendant at Pykett Avenue. I don't know if the Thai manager handed any

documents to the first or second defendant. He did not hand any documents to me.' Howard agreed that US taxes could be paid by the post. He admitted that most of the calls from Pykett Avenue to the States were made by him.

Mr Yeoh thus commenced his cross-examination of Howard. 'Do you agree that your grandfather was frugal, careful with money and tight fisted?' Howard's reply and his testimony under Mr Yeoh's cross-examination may be paraphrased as follows.

He would not say that the deceased was tight fisted. The deceased was not careless; he was normal. At times, the deceased was extravagant on cars, food and on travel. The deceased was very strict but he was not very careful with his finances. The deceased was a disciplined person with his schedule. He was set in his ways. He would not say that the deceased was careful with his finances and assets. The deceased would purchase anything he desire. The deceased sold the Teluk Bahang land below value.

In June or July 1992, on the instructions of the deceased, he (Howard) requested a copy of the agreement on the sale of the Teluk Bahang land from Messrs Nik Saghir. He did not know why the deceased instructed him so.

Asked to explain why Hamid testified that he or Richard propositioned him 'to do something' about the 1990 wills, if it was not true, Howard replied:

> After the sale (Teluk Bahang land) to the buyer obtained by Hamid felled through, Hamid blamed Richard and I as the cause of him being out of the deceased's favour. He (Hamid) was upset over his (financial) loss ... . He (Hamid) is giving false evidence and taking back on me and the first and second defendants.

Howard continued: He was not aware that someone from Pykett Avenue called Hamid for copies of the 1990 wills, in July 1992, and that Hamid left copies of the 1990 wills at Pykett Avenue. Before 1 August 1992, the deceased never requested nor instructed him to prepare or type any documents for the deceased. He did not know why he was asked to type the 1992 wills. Howard agreed, as the originals of the 1990 wills in court had no amendments, that the originals of the 1990 wills were not shown to him on 1 August 1992. Howard said copies must have been amended. He made no copies of the 1990 wills. Howard maintained he obtained copies of the 1990 wills from the deceased and not Hamid.

Handwritten amendments to the 1990 wills were made to all three 1990 wills. Those amendments were: (i) Howard substituting Khaw Teik Lim as a trustee, (ii) the variation of 5 years to 30 years, (iii) the reduction of Teik Hock's interests from 4% to 2% and that 2% to Howard, the reduction of Teik Ghim's interests from 4% to 2% and that 2% to Richard, (iv) Teik Chye replacing Cheng Bok as a trustee in event of Cheng Bok's death, and (v) Howard replacing Cheng Poon in the event of Cheng Poon's death.

He did not ask the deceased, although he was close to the deceased, why he wanted to amend the 1990 wills. He was not used to question the

A decisions of the deceased. Howard agreed that the impact of the amendments, although the amendments were not extensive, was immense.

The deceased's documents were in the deceased's safe. He (Howard) had never taken and he had not seen his father or brother taking any of the deceased's documents. The deceased's documents are still in the safe. The B receiver and manager took some documents. He did not know whether the deceased was careful with his documents. He did not know where the amended copies of the 1990 wills were kept.

After the death of the deceased, the first to third defendants had the keys to the deceased's safe. He did not search for a copy of the 1990 wills. C He did not look into his grandfather's possessions. Richard found, after he moved into the deceased's room, handwritten wills of the deceased (ID8A, ID8B and ID8C — not signed, not attested and not propounded by any of the parties).

Howard denied that he was never asked to change the 1990 wills. D Howard denied that there were never copies of the 1990 wills with the deceased's amendments. Howard denied any truth in Beng Tatt's account that he (Howard) took the safe keys and removed an envelope from the safe on 1 August 1992. But admitting he was speculating, Howard said, Say Bee and Beng Tatt had been paid, by his uncles, to give false evidence.

Howard denied he typed the 1992 wills without the deceased's E instructions, using the 1990 wills as precedents. The deceased did not want the 1990 wills, Howard said.

About a week after the deceased's death, Lim read the 1992 wills to his father, Richard, Cheng Liat and himself. He was not sure of Cheng Bok. He was not aware who had prior possession of the 1992 wills.

F On 3 August 1992, he and his parents accompanied the deceased to LWE Hospital, as the deceased had asked so. Howard denied he was present to prompt or remind the deceased of what the deceased had to say to Dr Tan. Throughout the entire consultation, he was silent. Howard denied he and his parents prompted Dr Tan to certify that the deceased G was of sound mind. Howard said, the deceased wanted to consult Dr Tan.

The other two wills were not prepared as he was watching the execution of the 1992 Thai will. He was not in a hurry to complete the other two wills. Howard denied he was keeping his eye on the deceased by watching the proceedings. Howard said, he was curious. He had never seen wills being executed before. He was curious as to how it would be done. It was H not true he was there because of his stake or because he was the sole author of the 1992 wills. He did not prepare the second 1992 Thai will. He was only aware of the second Thai will when Cheng Bok came to Pykett Avenue with the second 1990 Thai will alleging it was forged. Howard denied he was the author of the 1992 wills.

I Howard admitted that he had not received large sums, before June 1992, from the deceased. He was receiving RM50 per week. Whilst in the States, he was receiving US$1,500 per month. Other than that, he had not received any other sums from the deceased. Before June 1992, he had never received any monies from the deceased to buy a car.

Mr Yeoh: How (would) you explain all these large sums in June 1992? A

Howard: He had cash only in June 1992, the proceeds from the Batu Ferringhi land.

Mr Yeoh: How (would) you account for your uncles not receiving a cent from the Batu Ferringhi (land) sale?

Howard: I don't know why. B

On 1 September 1995, the first to third defendants were granted probate of the Thai estate. No property in Thailand had been sold. No dealings had been entered into.

Mr Yeoh: What reasons can you give for Dr Gafoor's testimony?

Howard: Dr Gafoor was introduced by Hamid Merican. They are very close friends as well as business associates. Hamid Merican, I believe, prompted Dr Gafoor to lie. I have no factual basis for what I say. C

In re-examination, Howard clarified as follows. He endorsed the cheque for RM225,000 [PB1(326)] as it was given to him for his endorsement. He never received the RM225,000. During cross-examination he said he was happy that his name was in the 1990 wills as a trustee. What he meant to say was that he was happy his name was in the amended 1990 wills as a trustee. D

When he received US$43,000 from the Malaysian and Thai estates, the US estate had liabilities but no funds. Only in April and May 1995 were monies received from the sale of the Benson land and condominium. He did not ask his uncles to contribute towards the payment of the US taxes as they did not have that money. The sale of the condominium was not sufficient to meet the US taxes. That property was mortgaged; about US$30,000 was outstanding. US$43,000 would be repaid to the Thai and Malaysian estates. E F

He had no intention of residing in the States. In August 1992, when he got to know that he would be a trustee of the estate, he abandoned his plans to emigrate to the States. He consulted Le Beau on his status as a trustee in the States, his re-entry rights and his ability to carry out his duties as a trustee in the States. His mother did not consult the estate's accountant on her taxes in the States as she had no income nor properties in the States. The Mrs Khaw in the accountant's bill was Mrs Khaw Bian Cheng. She had properties in the States. G

John Khoo advised him not to pay the RM866,000 (and RM826,000) as Cheng Liat and Cheng Bok had only photocopies of the documents supporting their claims and if those claims were paid out, he and the other trustees could be held personally liable. Cheng Bok and Cheng Liat showed him PB2(5). He was not shown DB1(A)(97–102). But he is agreeable to the payments of RM866,000 and RM826,000 to his uncles. H I

Le Beau informed him of the notices objecting to his petition for administration. The negotiation with Alex Tan took place in March or April of 1995. Because of the injunction of 23 May 1995, those negotiations

A ceased shortly thereafter. In May 1995, he was never in a position to sell Pykett Avenue because of two existing caveats.

His mother only handled the 'Kong Teik' ceremony that was held seven weeks after the death of the deceased. His mother did not handle the funeral expenses in Singapore. He did not have any documents on the
B 'Kong Teik' expenses. In December 1995, the receiver and manager took possession of all documents relating to the estate. He was mistaken when he said he saw the Thai manager, just a few months ago, at Pykett Avenue. He saw him in Phuket.

The originals of the 1990 wills were not the documents the deceased amended. He did not see the deceased amending copies of the 1990 wills.
C The amendments to the 1990 wills had immense impact, because of the five years moratorium to the 30 years moratorium.

Cheng Hum, 66, testified in examination-in-chief as follows. He is the eldest son of the deceased. His parents sent him, when he was an infant, to his grandparents. He lived for 24 years with his grandparents. When he
D was 24, he was sent to Australia to further his studies. He was there for three years.

Upon return, he met Liang Imm and her husband. Liang Imm who was living with their grandparents refused to allow him to live with them. She asked him to live with their father. Liang Imm lived with his grandparents
E until they passed away. His other brothers and younger sister lived with his parents 'until they gave up'. Cheng Poon never left Pykett Avenue.

He lived with his parents for five years. In 1961, when he got married, he moved to 7 Brown Road, a house belonging to his father-in-law. In 1973, he moved to the present house that the deceased gave him as a
F wedding present. The deceased did not give a house to his brothers as a wedding present as he (the deceased) did not accept their marriages. His brothers married without his father's knowledge. They just brought their wives home. In his case, the deceased arranged his marriage and hosted a lavish dinner.

G After return from Australia, he worked as a supervisor in a rubber estate — Merchiston Estate — near Taiping, until 1975, when the deceased sold the estate. Thereafter, he held no regular job. Once, he applied to the OCBC, Penang for a post. When that was discovered by the deceased, the deceased told the Manager not to employ him. The deceased said that he (the deceased) did not want his eldest son to work for anyone.

H His relationship with his parents was close. There were no ill feelings between him and his father. In the 1960's, he had no quarrels with the deceased. After Cheng Poon's marriage in 1963, his relationship with his parents deteriorated. Cheng Poon was constantly insinuating to the deceased that he (Cheng Poon) was a more capable son. He did not rebut Cheng
I Poon, as his parents would only listen to Cheng Poon. His relationship with his parents, up to 1988, did not improve. Each day, nevertheless, he was in his parents' house for lunch. The deceased insisted he should have lunch at Pykett Avenue. During lunch, Cheng Poon and Cheng Liat were also in the house.

His relationship with the deceased did not improve after 1980. It got a bit worse. It was all due to Cheng Poon's instigation and influence over the deceased. Cheng Poon was saying that he (Cheng Hum) had no son to carry on the family name. Cheng Poon was also saying that he (Cheng Poon) was good in business while he (Cheng Hum) was not. He did not defend himself.

He inherited a ⅓ undivided share of certain lands behind the Kek Lok Si temple from his paternal grandmother. The deceased owned the balance ⅔. In 1988, the deceased forced him, at Cheng Poon's instigation, to sell his ⅓ share in some of those lands. He had no reason to sell. The deceased threatened, unless he sold some of those lands, to disown him. Because of that threat, he could not protest. Hamid arranged the sale. He sold his ⅓ share concurrently with the deceased's sale of his ⅔ share. His share of the sale proceeds was RM330,000. The deceased commanded him, at Cheng Poon's instigation, to give RM130,000 to Cheng Liat and Cheng Poon. It was supposed to be a commission. He could not refuse. Cheng Liat and Hamid took RM80,000 while Cheng Poon took RM14,000. He only received RM200,000. He issued a cheque for RM80,000 [DB2(A)(12)] to Cheng Liat and handed that cheque to Cheng Liat and Hamid. He could not find the cheque to Cheng Poon.

The deceased also forced him, at Cheng Poon's instigation, to sell three pieces of lands in Bukit Tengah, Butterworth, lands the deceased had given him. He had no reason to sell those lands. He was not in need of money. He protested but the deceased threatened to disown him. Cheng Poon told the deceased to ask him to sell those lands. Thereupon, the deceased called and asked him (Cheng Hum) to sell those lands or he (the deceased) would kick him out of the house. Hamid arranged the sale. That sale was aborted. He had received the deposit and had paid a commission of RM70,000, on the deceased's instructions, to Hamid. The purchaser filed proceedings for the return of the full deposit. He had to return the full deposit. He had to fork out even the commission paid to Hamid as Hamid did not refund the commission. He asked the deceased for financial assistance, but the deceased refused to help him because of Cheng Poon's influence. In 1994, he sold the Bukit Tengah lands.

Sometime in 1990, the deceased wanted to sell the remaining lands behind the Kek Lok Si temple. Cheng Poon was instigating the deceased to instruct him to sell the remaining lots behind the Kek Lok Si temple. That time, he refused as the price offered was half the market value. Hamid was advising the deceased on the proposed sale. Similarly, he was threatened that he would be disowned. He told his father that he would not sell. The deceased told him not to come to Pykett Avenue anymore. Thereafter, he stopped going to Pykett Avenue for lunch. He also stopped his visits. He wanted to continue his visits, but he was afraid that Cheng Poon would continue his instigations and once more he would be forced to sell his lands. He was receiving a monthly allowance of RM1,000 from the deceased. After he stopped his visits to Pykett Avenue, his allowance was terminated at Cheng Poon's instigation.

In 1990, Cheng Liat was banned from Pykett Avenue. The deceased told him that Cheng Liat was poisoning his drinking water. By then, 1990, only Cheng Bok and Liang Imm were visiting the deceased. Liang Imm told him that she found difficulty visiting the deceased. She said that Cheng Poon would not allow her visits for various reasons.

His father's health, even before his mother passed away, was not good. After his mother's death, his father was suffering from depression, insomnia, palpitation of the stomach, heart problems and prostate cancer. Prior to 1988, before he was asked not to come to Pykett Avenue, he visited the deceased whenever he (the deceased) was hospitalised. He did not make similar visits, after 1990, as he was not told that the deceased was hospitalised. After 1990, he only visited his father once at Pykett Avenue. After that visit, someone from the office telephoned and told him not to visit the deceased anymore. He did not believe that his father had stopped his visits. He believed Cheng Poon was behind those instructions. He was not informed that his father was hospitalised in Singapore in 1993. He was only informed of his death.

He had no knowledge of the 1990 and 1992 wills. After Cheng Bok filed these proceedings, he got to know of those wills. He did not believe his father would leave him only RM20,000. The deceased, a kind and loving father, was not vindictive. The deceased would have been fair. The deceased would not leave him much less than his brothers. He believed, because of his experience with Cheng Poon, that it was all due to Cheng Poon's instigation.

He knew Hamid well. His father depended on Hamid for advice on the sale of properties. Hamid was close to Cheng Poon and Cheng Liat. Hamid was close to the son who was having the upper hand. Cheng Liat held the upper for a short six months in 1990. Then, Hamid was closer to Cheng Liat than Cheng Poon. After that six months, Cheng Poon was ascendant; Cheng Liat was always quarreling with a Thai girl, his father's favourite. He was present when that was happening.

He knew nothing of his brothers' trip to Singapore in 1990 with the deceased. His brothers were arranging the distribution of his father's assets to his (Cheng Hum) detriment. Cheng Hum believed it was a case of 'less men more share'. Cheng Hum did not agree with Cheng Bok's reasons for his exclusion from the 1990 wills. 'Cheng Bok gave those reasons with an ulterior purpose.'

Referring to DB1(A)(1–5), Cheng Hum alleged that only Cheng Poon could have instigated those letters. On his own, his father could not have authorized those letters. The deceased was not a man who would even attempt to take back what he had given. He gave those lands to him. The deceased was a man of his word.

He only inherited the Ayer Itam lands from his grandmother. Liang Imm inherited the bulk of her (grandmother) properties. During his father's lifetime, he inherited from his father, (i) seven rent control houses at Dato' Kramat Road, (ii) the Bukit Tengah land, and, (iii) his present house — 38 Lebuh Raya Scott — a small double storey detached house. He did not

ask for those properties. The deceased gave him those properties out of his love for him. His father was giving a lot of money to Cheng Poon. Cheng Liat and Cheng Bok did not get any land from the deceased. He is supporting himself with the rent received from those seven shophouses, with the interests from the sale proceeds of the Bukit Tengah land and with the help of his daughter.

The deceased made a will in 1986. That was his father's last will. Referring to DB2(A)(5–8), Cheng Hum said that his father instructed him not to inform Cheng Poon of the 1986 will. The deceased did not inform him why he was appointed in place of Cheng Liat. The deceased instructed him not to tell Cheng Poon as the deceased was afraid Cheng Poon would ask him (the deceased) to delete him as a trustee.

Cheng Hum beseeched the court to declare the 1986 will as the last will of the deceased, 'as my father had made so many wills over the years I am lost as to which will is valid'. Cheng Hum said that he did not think that the 1990 will is valid as Goh Eng Kee had passed away and the other witness (Hamid) was a bad influence.

His father and mother were inseparable. Everything his father did, he consulted his wife. His mother had a great influence on his father, including his fathers's wills.

Cheng Hum considered himself as his father's favourite son until the deceased was poisoned against him. In 1988, after his mother's death, the deceased confided to him that he (the deceased) was afraid his brothers would throw his (the deceased) wishes into the sea.

Under cross-examination by Mr Khoo, Cheng Hum testified as follows. His father did not get along with his grandmother, as Ooi Geen Peen could not get along with her. His mother and grandmother were squabbling. His father sided his own wife.

He and Liang Imm inherited properties from their grandmother. Cheng Poon, Cheng Liat, Cheng Been and Liang Imm inherited a Penang Hill house from their grandmother.

Cheng Hum disagreed with Hamid's testimony that his father did not leave him any properties as he had no male issue. The deceased said that he did not mind. Grace is not his natural issue. He did not know that his father did not give him any inheritance because he had no natural issue. Cheng Hum agreed that his father believed in Hokkien traditions. He preferred daughters to sons. 'Liang Imm is the richest amongst us.' However, Cheng Hum also agreed that Liang Imm is rich because she inherited from their grandmother and not their father. 'To a certain extent, my father was biased towards small issue.'

Cheng Hum agreed that although he was a supervisor in the rubber estate, he was in Penang most of the time. He disagreed that his father was angry with him because the estate and newly planted trees under his care were razed. He disagreed that his father was angry with his wife because she refused to attend to the ancestral tablets. 'When Cheng Poon was not doing That duty, it was my wife who carried out that task.'

A Cheng Poon instigated his father to force him to sell the Kek Lok Si lands as Cheng Poon wanted a ⅓ share of the sale proceeds.

In 1990, sometimes, his father was normal and sometimes he was not. When he was not, he would be starring blankly and not know what he was doing. 'Fifty percent of the time, he was normal and 50% of the time he B was abnormal.' 'During lunch he ate quietly. After lunch, he would lie on the sofa, without talking.'

When he and his father sold their Ayer Itam lands, his father did not pay a commission. His father refused to help him return the deposit on the Bukit Tengah land sale as Cheng Poon had stopped him.

C In 1990, the deceased was giving money to Cheng Poon and his family. Cheng Hum said, he had no 'former knowledge' that the deceased was giving money to Cheng Poon. The 1990 wills were invalid as his father, could not understand, though he could read, the contents. The deceased was not his usual self as he was not his own man. To everything he asked, the deceased referred him to Cheng Poon or Hamid. The D deceased could not recognized him. The deceased called him Cheng Poon.

In 1990, the deceased was not well. In 1990, he only spent an hour a day, during lunch, with the deceased. The lunches were always quiet affairs.

E The deceased was not sound when he made the will dated 1 February 1989 — DB1(B)(6). 'My mother was like my father's walking stick. When she died in 1988, he collapsed.'

When the 1989 and 1990 wills were made, he and Cheng Imm had inherited assets whilst his brothers had none. The deceased forced him to F pay the RM130,000 commission. He needed that money; he would not have paid if he was not forced by his father.

Cheng Bok never had the upper hand; he relied on Cheng Liat for information. He (Cheng Hum) was not called for the reading of the 1992 wills. The deceased was careful with money.

G Under Mr Koh's cross-examination, Cheng Hum testified as follows. He was living with his grandparents at 46A Northam Road. His parents moved to Pykett Avenue. He remained with his grandparents. Liang Imm inherited the bulk of his grandmother's estate [see DB2(A)(1)].

The deceased was strict. The deceased expected obedience. When the H deceased wanted to sell the Ayer Itam lands, he believed the deceased expected that he (Cheng Hum) would follow suit. He believed the deceased also expected that his wish to sell the Bukit Tengah land would be obeyed. He (Cheng Hum) would be disowned if he disobeyed. The deceased insisted that he should have lunch at Pykett Avenue. He decided, when he I stood firm and refused to sell the remaining Ayer Itam lands, not to have any more lunches at Pykett Avenue. The deceased's letters to him, claiming his properties, were instigated by Cheng Poon to pressurise him into concurring with the sale of the Kek Lok Si lands.

His father was a quite man. He would not talk unnecessarily. He would command and he would not explain his decision. Later, Cheng Poon could influence his father and even made decisions for him (the deceased).

Mr Koh: I put it to you that up till the day the deceased died, nobody could question your father.

C. Hum : Cheng Poon could question my father. After 1990, I was not aware of what was happening in Pykett Avenue. Before, I heard Cheng Poon questioning our father.

Cheng Hum alleged that his brothers could get the upper hand more easily if they enlisted Hamid's help. 'When his mother was alive, when she was ill or not well, she would not allow my father to travel.' Cheng Hum maintained that he paid RM14,000 to Cheng Poon. Hamid, helping his father to sell lands to earn commissions, had a reason to instigate his father into selling his lands. Although he knew that the deceased was not well, he made no powers to have the deceased medically examined.

Re-examined, Cheng Hum clarified that his parents did not object to his adoption of Grace. Grace was provided in the 1986 and 1987 wills. His brothers, in 1989 and 1990, had an inherited property — the Penang Hill house. Cheng Bok inherited a $\frac{1}{2}$ share of two houses in Dato Keramat Road from their grandfather.

The testimony of the other witnesses

Lim Bok Eng, 56, affirmed as follows. She is a director of Glashaus. Cheng Poon is her husband; Richard, Howard and Gim Chuan are her children. From 1962 to 1983/1984, she was staying at Pykett Avenue. She moved out in 1983/1984 as she could not get along with her mother-in-law. She lived for ten months in Houston, Texas. When she returned to Penang, she set up a glass workshop at 72J Lorong Birch, Georgetown.

In 1988, she received the deceased's message to go to Pykett Avenue. There, the deceased told her to visit Ooi Peen Geen at the Specialists Centre. After Ooi Geen Peen passed away, she made daily visits to Pykett Avenue; the deceased asked her to sell some of his wife's jewellery. The deceased asked her to move back to Pykett Avenue, to take care of the house and Cheng Been. She agreed if she could bring along her workshop. The deceased agreed. Sometime in 1991 or after the deceased was discharged from LWE Hospital, she moved back to Pykett Avenue.

In 1993, she, husband and Richard accompanied the deceased for treatment at Singapore. She was taking care of him. The estate paid the total expenses in Singapore. She paid the rental — S$4,600 per month — for the apartment in Singapore. The medical bills were paid by the estate. She advanced S$5,000 — the taxi fare to and fro to visit the deceased, their meals and the bird's nest for the deceased.

She was with the deceased when he was in China and the States at the end of 1992. The condition of the deceased worsen in the afternoon of 8 April 1993. The deceased did not ask to see anyone. She asked the

A deceased if he wanted to see anyone, especially those relatives in Singapore, but he said, 'No'. She asked the deceased whether he wanted to see 'Cheng Bok'. The deceased did not even care to reply.

Before the death of the deceased, when the Thai manager was visiting the deceased, she heard the deceased instructing the Thai manager to go B to Singapore with money. The Thai manager came to Singapore, either on the 10th or 11th of April, after the deceased passed away, with the equivalent of RM14,000. She kept the RM14,000. She deducted S$9,600 she had advanced and used the balance for transportation and for their expenditure in Singapore.

C She discussed the funeral arrangements with Cheng Bok and other relatives. Her husband did not participate. Cheng Poon asked her to refer to Cheng Bok who he said was his elder brother. Cheng Bok wanted a Chinese style coffin. She paid for the coffin, the mourning clothes, joss papers and offerings. She paid all expenses. She did not claim for any reimbursement. She could not remember whether there was a discussion D to bring the body back to Penang.

On 3 August 1992, at the request of the deceased, she accompanied the deceased to LWE Hospital. She did not know who made the arrangements. She was not told beforehand of the purpose. She was in the consultation room when the deceased spoke to Dr Tan Chee Kuan.

E Cheng Poon and Richard purchased a condominium in Horizon Towers after the deceased passed away. The purchase (over RM420,000) was financed by a 90% loan secured by Cheng Poon's fixed deposit of RM150,000. She and her husband paid a 10% deposit. Monthly instalments were paid from their account. Richard was lending his name. Cheng Poon and Richard also purchased another condominium — Villa Indah, Pulau F Tikus — for RM410,000, financed by a loan of RM287,000 secured by their fixed deposit of RM100,000.

She had workers working for Glashaus. The employees of the estate did not work for Glashaus. Glashaus never paid rent when the deceased was alive.

G Referring to PB1(114), Bok Eng testified that she won RM556,700 in the 4-digit lottery. She won on the number 3275. Her partner fell down. A fall is 275. He fell on the third floor. She added three in front. All Glashaus workers bought the same number.

The deceased never spoke to her on the Teluk Bahang land or Pykett H Avenue. She and Cheng Poon paid the instalments for the Estima after the deceased passed away.

Under Mr Khoo's cross-examination, Bok Eng testified as follows. She is a Singaporean and a permanent resident of Malaysia. She was 18 when she married Cheng Poon. She left Pykett Avenue as her mother- I in-law was not treating her like a daughter. It was not true that she had worked in a cabaret.

B. Eng: I don't know when DB1(C)(47) was written. But when my mother-in-law was alive, the deceased listened completely to his wife. He would comply with his wife's wishes, especially when

she was old and sick. But my father-in-law did ask me to go back to Pykett Avenue even before my mother-in-law's death.

Two days before her mother-in-law's death, the deceased asked her to move back to Pykett Avenue. She did not move back immediately as she had to apply to move Glashaus from Lorong Birch to Pykett Avenue. She had to apply for three phase power.

She was solely in charge of 'Kong Teik' ceremony during her mother-in-law's funeral; Cheng Bok took charge of the other arrangements. Bok Eng denied she invited herself to Pykett Avenue, in August 1992, after the deceased was senile.

Mr Khoo: I put it to you that PB2(35) — the tenancy agreement between Khaw Bian Cheng Sdn Bhd and Glashaus — was a sham agreement to seek protection under the rent control act?

B. Eng: This agreement was not signed by me.

Mr Khoo: You entered into PB2 (35) to avoid being evicted from Pykett Avenue?

B. Eng: I deny that.

Except when he sold the Batu Ferringhi land, the deceased had never given her large sums. The deceased gave her a large sum to pay the brokers. Bok Eng disagreed she took the RM225,000 in cheque PB1(325) but she agreed only she could receive the RM225,000 in cheque PB1(325).

In early April 1993, whilst the deceased was treated in Singapore, she came back to Penang with Cheng Poon for a few days.

Mr Khoo: Do you agree that you came back and went to the BBMB Pulau Tikus?

B. Eng: I go every day.

But Bok Eng could not remember whether she was at the BBMB on 9 April 1993. She said that she could not remember anything about a sum of RM140,000 being taken from the deceased's account at BBMB Pulau Tikus on 9 April 1993. She admitted that a sum of RM140,000 was credited into her joint account with Cheng Poon. She disagreed that she and Cheng Poon 'came back to Penang to clean out the deceased's account'. Asked whether her family took at least RM2.7m from the deceased, she said that she was not sure of the figures. She said that she has about RM130,000 in all her accounts in Malaysia and Singapore. She did not know the nett worth of her family; in 1995, the two condominiums in Penang were sold with a loss of thousands. She agreed that everything her family has, except her lottery winnings, Glashaus and apartment in Singapore, came from the deceased. She denied her family 'stashed' away RM2.7m. She denied her family sold the condominiums and luxury cars as they foresaw recovery actions. She said her family only has: (i) the Teluk Bahang land, (ii) the cars belonging to her sons, (iii) her condominium in Singapore (iv) her company, Glashaus, and (v) money in the bank. She has a little jewellery.

She denied that she and her husband, between April 1992 to June 1993, were siphoning large sums of money from the deceased and from

the estate. She did not see her husband signing the cheque for RM140,000 but she heard that the RM140,000 was from the deceased's account.

Mr Khoo: I put it to you that on 9 April 1993 the deceased was already in a coma?'

B. Eng: I was not in Singapore on 9 April 1993.

Mr Khoo: I put it to you that you and your husband operate the deceased's account when the deceased was in a coma?

B. Eng: That is not true.

She did not know the current value of the Teluk Bahang land. She could not remember whether she called Say Bee on 12 July 1992 to accompany the deceased to LWE Hospital. The deceased was shaking and shivering; she panicked and she might have called anyone. She witnessed the deceased having seizures, but she was not sure whether it was a stroke. Sometimes the deceased answered when called, but sometimes he was quiet. And so, she did not know whether the deceased was in a confused state or not. She did not agree that the deceased was confused for some time. She heard others saying that the deceased said that he saw persons walking in the pictures and on the ceiling. After discharge from LWE Hospital, the deceased had no loss of memory. It was not true that the deceased's memory was failing him in 1992.

At 6.30pm on 1 August 1992, she was in the kitchen. At 7pm, she saw Howard. The family had their meal together. She knew nothing of the preparation of a will on 1 August 1992. She agreed that she accompanied the deceased to consult Dr Tan for the first time on 3 August 1992. She denied that she accompanied the deceased, knowing a will would be signed, to ensure that a certificate would be issued. At 4pm she was downstairs when the 1992 wills were being signed. Her father-in-law told her to prepare tea. The deceased told her that Lim would be coming. She assumed that wills would be signed. Her family might have known of the execution of wills but she was not.

Her family and the deceased departed for Singapore on 8 March 1993. On 9 March 1993, the deceased was admitted to the hospital whence he stayed, except for four days at the rented apartment in Singapore, until he died. Whilst the deceased was in the hospital in Singapore, Say Bee slept each night in the deceased's room. Say Bee had a helper.

Mr Khoo: Hamid Merican testified ... about two days before the deceased passed away he called Pykett Avenue over the phone, he heard your voice instructing the person receiving his telephone call not to tell where the deceased was. Do you agree?

B. Eng: Maybe I said so, maybe I did not.

Mr Khoo: When the deceased was in a coma and ill, why did you not inform the other children?

B. Eng: Before I came back to Penang, I asked him if he wanted to see his other children. When I named his children, sometimes he would shake his head and sometimes he would keep quiet.

She denied that her family did not reveal that the deceased was seriously ill as her family wanted to avoid questions being raised by other children on the deceased's will and his properties.

The Thai manager came with Baht230,000. Since no one took charge of that money, she took it towards expenditure. She disagreed she called the Thai manager, after the death of the deceased, to bring Baht230,000 for funeral expenses.

The deceased passed away in the middle of the night to 1am on 10 April 1993. The deceased, before that, was in the ICU. 'All of us were sitting in the corridor. I (am) not sure whether Cheng Bok was there. Cheng Bok never saw or spoke to his father in Singapore.' She could not recall who called Cheng Bok to the Singapore Hospital.

Mr Khoo: I put it to you ... the deceased wanted to see his children, but your family was blocking it?

B. Eng: That is not true. He did not ask for his children.

Mr Khoo: Cheng Bok was not consulted on funeral matters?

B. Eng: I did discuss with Cheng Bok on the coffin. Cheng Bok did not say that he wanted the deceased's body to be brought back immediately to Penang.

Under cross-examination by Mr Yeoh, Bok Eng testified as follows. She did not know the amount of jewellery her mother-in-law had when she passed away. A few months after the death of his wife, the deceased asked her to sell some jewellery. She sold the jewellery on three occasions. She had no idea why the deceased asked her to sell the jewellery. She carried out his instructions. She knew that her children, in 1991, were buying luxury cars. The deceased gave the money to them.

Mr Yeoh: How would you explain that the deceased was selling jewellery of his wife but giving money to buy cars?

B. Eng: The sale of jewellery was a few months after his wife's death. Maybe he needed the money. But the purchase of cars came later.

She accompanied the deceased to the hospital together with her husband and children at the request of the deceased.

In re-examination, Bok Eng clarified: The deceased was capable of feeding himself both before and after his stay at LWE Hospital. When Glashaus first rented premises at Pykett Avenue, there was no tenancy agreement. She started paying rent in 1994. She came back to Penang on 4 April 1993. She was in Penang until 9 April 1993. She went back to Singapore on 9 April 1993. She took Baht230,000 to reimburse her expenses. The deceased gave her a large sum of money to pay Hamid, Tan Beng Hun (DW3) and one Tan Peng Seng. Her condominium in Singapore is owned jointly with her sister.

The testimony of Nik Saghir and Ghazi bin Ishak, in chief, under cross-examination and in re-examination, may be abridged as follows.

Nik Saghir bin Mohd Noor, 63, affirmed he was introduced to the deceased by Hamid, his close friend who habitually consulted him on land matters. Towards the end of 1988, Hamid told him that the deceased wanted him to draft a will. He asked for the prior wills of the deceased. In late 1989, Hamid gave him a copy of a will dated 1 February 1989 —

DB1(B)(6) — and a copy of a deed dated 2 March 1989 — DB1(74–78). He asked Hamid, when he received the will dated 1 February 1989, for the specific instructions of the deceased. Hamid said that the deceased wanted some amendments to his earlier will. He (Nik Saghir) advised a codicil. He prepared the preliminary draft of the proposed codicil. On or about 10 March 1990 (Nik Saghir admitted he was not sure), the deceased with Hamid called at his office to discuss the proposed codicil. The deceased instructed him to amend the draft codicil. They adjourned for lunch at the Hilton Hotel; there, he met Cheng Poon and Cheng Bok (Nik Saghir was not sure of Cheng Liat).

Present during the discussion of the proposed codicil in his chambers were the deceased and Hamid (Nik Saghir was not sure of Lim). The deceased's children were not present. His only comment to the deceased, with regard to the 1989 deed, was that it seemed to favour one son; Cheng Poon would have a greater say. He could not recall the reaction of the deceased; but when he said to the deceased that he had ignored the interest of his daughter, the deceased said he had given enough property to her. The deceased instructed him to replace Richard with Cheng Bok as a trustee in the will dated 1 February 1989 but not to disturb the beneficial interests in the will of 1 February 1989.

He prepared the codicil strictly as instructed by the deceased. The codicil was signed at the E & O Hotel, Penang in the middle of March 1990. Present were Lim and himself. They subscribed as witnesses. The children and Hamid were outside.

Prior to execution, a minor amendment requested by the deceased was made to the codicil. He left it to Lim to type the required amendment. Lim returned with the amended codicil. Only one copy of the codicil was signed by the deceased. He wanted a copy but the deceased insisted he would keep the signed codicil.

He prepared the agreement dated 21 July 1991 on the sale of Lot 678 South West District, Penang. Hamid secured the purchaser. The deposit was paid directly to the deceased. On or about 13 July 1992, he received the deceased's letter dated 30 June 1992 [D1(23)] terminating the sale agreement dated 29 July 1991. He also received a similar letter dated 30 June 1992 from Cheng Poon. The sale was terminated as the purchaser defaulted on the balance. He notified the purchaser's solicitors accordingly. The purchaser was trying to obtain a loan. That was the reason, he believed, why the agreement was terminated a year after the execution of the agreement in spite of the three months' completion period. The deceased telephoned him, about but not more than a month prior to his receipt of D1(23); the deceased wanted to terminate the agreement dated 29 July 1991. The deceased enquired if he (Nik Saghir) had received the balance purchase price. When he replied in the negative, the deceased said that he was terminating the agreement.

He recalled that the number of years before the shares in Khaw Bian Cheng Sdn Bhd could be transferred was reduced at the requests of the

deceased's children. There is a note on his file that his partner, Ismail bin Ibrahim, instructed a copy of the sales agreement dated 29 July 1991 to be forwarded to the deceased. Hamid gave instructions on the sale agreement dated 29 July 1991. He believed that Hamid saw him three times on the codicil. On the last occasion, Hamid came with the deceased.

Ghazi bin Ishak, 53, affirmed that he witnessed the execution of the 1990 wills on 24 October 1990. He did not prepare the 1990 wills. He was given to understand that Hamid prepared the 1990 wills. His role was to attest the signature of the deceased.

Hamid brought a draft will, about ten days before execution, for his perusal. After perusal, he returned the draft will to Hamid. He might have commented on the draft and made some amendments. Later, Hamid and the deceased came to his office with the original copies of the wills he was to witness. The deceased intimated to him that he wished to sign his will and wanted him and Hamid as witnesses.

He requested the deceased to read the will, to initial each page he read, and then to sign the will. The deceased read each page of the will. The deceased did not require any amendment. The deceased signed the will; he and Hamid signed after the deceased. They were the only persons present. He gave the executed wills to the deceased. Copies of the executed wills were not given to him. He could not recall whether there were any duplicate copies of any of those three wills.

After 24 October 1990, the deceased did not see him again on the 24 October 1990 wills. He could remember those wills, even though seeing it for the first time in years, as the deceased was a good friend and those wills were the only wills of the deceased he witnessed. The 1990 wills were the wills he witnessed on 24 October 1990.

Ghazi Ishak was positive that the deceased read the 1990 wills. 'Dato' Khaw was a very careful man. He was a man requiring all things to be done properly. He was a meticulous man. I did not mix with the deceased socially, but from my dealings with the deceased, that was the impression I had of the deceased.'

He did not read the 1990 wills to the deceased as the deceased spoke and read good English. The deceased only spoke to him after he had read and executed his wills. They spoke of other things. The deceased spoke in his usual manner.

Dr Tan Chee Khuan's full testimony may be paraphrased as follows. He was familiar with the deceased. On 16 March 1990, the deceased came to his clinic with his lawyer, one Lim, Cheng Liat and Hamid. The deceased wanted to make some changes to his will and wanted him to assess if he (the deceased) was of sound mind. The deceased told him of the proposed changes: (i) withdraw Teik Ewe (Richard) as a trustee and appoint Cheng Bok instead, (ii) the appointment of his grandsons, Teik Ewe and others, as trustees in the event of the death of his sons who were trustees, and (iii) a term of ten years in which his properties and house could not be sold. He asked the deceased for his reasons. The deceased

A replied that Teik Ewe was in the States while Cheng Bok was back from Johor Bahru. The deceased said, he wanted Cheng Bok back as a trustee, for convenience and in fairness to Cheng Bok who had reconciled with him. Dr Tan Chee Khuan testified that the deceased, on 16 March 1990, was of sound disposing mind.

B The deceased also saw him on 24 October 1990. He came with his clerk. He could not remember anyone else, but Lim was not present. The deceased wanted to change one of the trustees — the removal of Cheng Liat and the appointment of Teik Lim and Teik Ewe (Richard). The deceased said he was not happy with Cheng Liat for recently misappropriating RM14,000 in the United Kingdom and for lying. The C deceased told him that he came to see him as he felt that there could be challenges to his will if it was changed and he wanted him to certify that he was of sound mind. Dr Tan testified that the deceased, on 24 October 1990, was of sound mind.

They talked of other things as well, including the future of Cheng D Been who is suffering from chronic schizophrenia. The deceased asked if there is a new breakthrough in treatment for Cheng Been. They discussed a new drug — Leporex. The deceased gave his written consent for the new drug to be administered. They had a long discussion and exchanged views. The deceased, a friend, also talked about his (Dr Tan) father-in-law.

E Then Dr Tan corrected his testimony — the discussion on Laponex took place on 24 July 1992; on 24 October 1990, they discussed treatment for Cheng Been in the United Kingdom; he advised it would not be helpful. On 24 October 1990, the deceased was healthy. The deceased wanted a penile prosthesis. They had a long discussion on that possibility. F He took the deceased who was serious about the penile prosthesis to the surgeon. Hearing the surgeon's advice on the anaesthetic risk, the deceased decided against the penile prosthesis.

PB1(167) was his written opinion that the mental condition of the deceased prior to 3 August 1992 was unpredictable. The doctor explained that the deceased, on 12 July 1992, was admitted for a brain infarct — G damage to the brain by a stroke or a lack of blood flow or oxygen to the brain — and he formed his opinion basing on the report of Dr Francis that the deceased was mentally unpredictable and x-ray report. In Dr Tan's opinion, it was possible that the deceased had a memory disturbance — a lapse of memory. Brain infarct can cause senility and deterioration of the H brain and mind. Sometimes a patient can die of a brain infarct. The brain infarct was serious, but by 17 July 1992 the deceased had recovered. But his recovery in that five days was no indicator that the damage to the brain was slight; it was a physical and not mental recovery. It might not have been a full mental recovery.

I In July 1992, he did not see the deceased. He saw the deceased on 3 August 1992. The deceased came with (I think) Cheng Poon for a certification that he was mentally sound to change his will. One of Cheng Poon's sons (pointing to Howard) was present. They were constantly by

the deceased's side. The deceased wanted Richard, Cheng Bok, Cheng Poon as governing trustee and Howard as his trustees. He asked for the reason. The deceased said Teik Lim was overseas. It was a short conversation. The deceased spoke to him personally. The deceased was not prompted. He spoke on his own volition. The deceased consulted him on five separate occasions. Cheng Poon, at least on two occasions, was present.

In Dr Tan's opinion, basing on the mental condition of the deceased on 3 August 1992, it was possible that the mental condition of the deceased could fluctuate from day to day. He spoke to the deceased on all five occasions. On each occasion, he was assessing his (the deceased) mental condition. From his assessment, it was entirely probable, although the deceased was mentally sound on 3 August 1992, that the deceased prior to 3 August 1992 might have had mental lapses and mental fluctuations. The mental condition of the deceased would fluctuate from hour to hour.

The visit on 3 August 1992 was the shortest. He could not recall any small talk. The deceased was rather weak. He remembered that the deceased was quite happy. On the fifth visit — 27 January 1993 — the deceased was unhappy. As for the other visits, the deceased was always looking happy. He believed the deceased's clerk arranged all five visits.

Under cross-examination by Mr Koh, Dr Tan said that the deceased saw him for his certification on 16 March 1990, 24 October 1990, 24 July 1992, 3 August 1992 and 27 January 1993. On all five occasions, he found the deceased to be mentally fit and of a sound disposing mind. Dr Tan explained that he used the expression 'sound disposing mind' as the deceased was aware of what he was saying to him and of what he was saying to the deceased.

On 24 July 1992, the deceased came to his clinic with Cheng Poon. The deceased wanted to transfer properties to Cheng Liat, Cheng Poon and Cheng Bok but not Cheng Hum. He asked the deceased what would be given to Cheng Hum. The deceased replied that Cheng Hum was too rich and Cheng Hum had already inherited a lot of property from his (Cheng Hum) grandmother. He spoke to the deceased about the new drug — Laponex.

On 27 January 1993, the deceased came to his clinic with his (the deceased) clerk and a broker, one Ah Tan. The deceased was angry that Cheng Bok wanted to control his property and had accused him of being senile as he (the deceased) purchased six cars within a year. The deceased was unhappy that Cheng Bok mortgaged a house he had given him. He said Cheng Bok was ungrateful. The deceased said he spent RM28,000 for Cheng Bok's first wife's cancer treatment and had to support Cheng Bok's second wife and Cheng Bok's third wife.

The deceased said that he purchased six cars for his pleasure and for the use of his family. The deceased listed those cars: (i) Rolls-Royce, (ii) Mercedes-Benz, (iii) BMW, (iv) Porsche, (v) Peugeot and (vi) Chrysler Alpine. The deceased remarked: 'Why could I not buy all those cars?' The

A deceased said the Porsche was for his grandson, the Peugeot for his sons and the rest were 'for his pleasure'.

The deceased told him, on 24 October 1990, he would not allow Cheng Liat to his home.

Dr Tan further said, 'the deceased's physical weakness was not a sign
B of mental deterioration'. However, he could not say whether the deceased on 24 July 1992 had fully recovered his mental faculty. The mental condition of the deceased, on 24 July 1992, 3 August 1992 and 27 January 1993, were about the same — there were no significant changes; the deceased appeared to be sound.

C Under cross-examination by Mr Yeoh, Dr Tan testified that he first saw the deceased on 23 October 1987, when the deceased was warded at LWE Hospital. The deceased who was complaining of wind in his stomach and of breathlessness was also suffering from anxiety. According to his colleague who attended to the deceased, there were periods when the deceased had taken too much medication, and during those periods the
D deceased was talking nonsense. By the time he saw the deceased, his colleague had reduced the medication and he did witness the deceased talking nonsense.

The deceased, when he saw him on 23 October 1987, was troubled by 3 concerns; (i) his wife was very domineering — she was controlling his
E diet such that there was very little ruffage, (ii) the distribution of his property, his will and that some of his children would challenge his mental capacity, and (iii) his son Cheng Been. On 24 October 1987, they spoke of the same subjects. The deceased said that he would instruct Goh Eng Kee to prepare his will and that he (Dr Tan) could certify to his mental capacity. But the deceased never came with Goh Eng Kee.

F The deceased did not inform him that he had executed wills prior to 24 October 1987. The deceased did not ask him to certify he was of sound disposing mind when he executed the codicil to the will dated 6 December 1986 [DB2A(8)] and the will dated 27 December 1987 [DB1(B)(3–5)].

G Dr Tan explained that a person talking nonsense is disorientated and in a confusional state. Maybe, the deceased was disoriented because he was taking too much sedatives or suffering withdrawal symptoms when those sedatives were suddenly stopped — according to his colleague's notes, the deceased was taking sedatives for one year prior to 1987. He prescribed drugs to stabilise the deceased, that is, to help the deceased to
H relax and to sleep. Previously, the deceased was on too many drugs.

His social conversation assisted him in his assessment of the deceased. 'Sound disposing mind' is an accepted medical expression that a person has a satisfactory testamentary capacity. To assess if a person is of sound disposing mind, he would determine first if that person is orientated to
I time, place and person. He would check if he is labouring under any delusions or false belief. He would ask questions on what he wants or intends, the wills and changes and for his reasons. On each of the deceased's five visits (1990–93), he issued a certificate deposing to the mental stability of the deceased for the day of the certificate.

In October 1990, when the deceased consulted him on the penile prosthesis, the deceased came with a young lady. The deceased told him that that young lady was his companion looking after his physical needs.

Mr Yeoh: Doctor, did it not occur to you that the deceased aged 85 asking for a penile prosthesis might not be in control of his senses?.

Dr: He was in control. Before his wife passed away, he was inhibited. After his wife passed away he gave me an impression that he wanted to enjoy and reclaim his youth. When he saw me in 1990 he expressed to me his woe about his physical instability.

In re-examination, Dr Tan related that his assessment was sufficient for him to issue his five certificates. He said he was not told that the deceased was showing signs of senile decay, but if told he would have looked for those symptoms. The certificates he issued were good for the day but it was possible that the mental state of the deceased would not be stable even for that day. Not all Parkinson's patients suffer mental deterioration. Altogether, he issued five certificates, but he could not find the 16 March 1990 certificate.

In further examination-in-chief, Dr Tan revealed that the deceased, according to a note dated 22 July 1992, had Parkinson's disease and that the consent to administer Leporex was given by Cheng Poon. Under Mr Koh's further cross-examination, Dr Tan clarified that he was not saying that a patient with Parkinson's disease would not have the mental capacity to make a will.

The court asked the following question: 'What impression did you have as you were speaking to the the deceased'. The doctor answered: 'He was talking normally, like a normal person.'

The other doctor, Dr Francis Tan, testified that he saw the deceased on 12 July 1992. The deceased was referred to him with a history of seizures — jerking movements of the arms and legs lasting a few minutes — at 3am, 5am, 7am and 9.30am. There were two or three possible causes; (i) a stroke, a mind stroke in the brain,(ii) the medication that the deceased had been taking, and, (iii) a variety of problems with his blood chemistry. A brain scan showed a lacuna infarct (a mild stroke) on the left side of the brain. The deceased had regained consciousness and was able to talk when he first saw the deceased. However, at the hospital, there were periods when the deceased was slightly confused. The deceased appeared very alert in the morning of 13 July 1992; he could get up and was even trying to do some knee squats. There were no reports of any seizures during the night of 12 July 1992 to the morning of 13 July 1992. However, the deceased was a little confused at 6pm. A similar pattern was noticed on 14 July 1992 — the deceased appeared to be better, talking reasonably and lucidly, in the morning, but a little confused in the latter half of the day. On 15 July 1992, the deceased was rambling and for no apparent reason was repeatedly doing something with his hands. However, that disappeared on 16 July 1992 — the the deceased was more his usual self and was showing interest by reading the newspapers. On 17 July 1992, the deceased was discharged at his own request.

A Initially, on the first, second, maybe the third day, particularly at night when he would show some confusion or restlessness, the deceased was restrained with cotton bandages, on his hands and (maybe) his knees, to prevent him from hurting himself. The deceased had some hallucinations. The brain infarct could affect the memory of the deceased. There were B times, over the first three days, when the deceased was more alert than other times. That fluctuation, after the first three days, appeared to have diminished — he was no longer rambling or confused as when he was admitted.

Given the right circumstances, the doctor testified, there could be a C recurrence of the deceased's fluctuating condition. He did not diagnose Parkinson's disease. Parkinson's disease was noted on the referral note to him; he merely noted it on his file. The repetitive hand movements were not so typical of Parkinson's disease. He said, if the deceased was suffering from a recent stroke and Parkinson's disease, and the deceased was old, it was likely that the deceased's memory and mental process would have D been affected. According to the GP's note to him, the deceased had been taking calcium supplements, vitamins, sleeping pills, and medicine for Parkinson's disease, his blood pressure, constipation and indigestion. The combined effect of that medication could cause the confusion. The doctor opined that it was likely that that set of medication if taken after discharge would cause hallucination and confusion to the deceased. E

The deceased had a history of prostate enlargement. There was a mild impairment of his kidney function, but that impairment would not contribute much to his mental deterioration as it could be corrected with treatment.

F Under cross-examination by Mr Koh, Dr Francis testified that he did not observe the seizures. He could not say whether the deceased, on 12 July 1992, was capable or incapable of signing a cheque. He did not test the ability of the deceased to sign a cheque. But the deceased was a sick man. Considering the medical condition of the deceased, he would be surprised if the deceased had the ability on 12 February 1992 to sign a G cheque. Dr Francis Tan opined that the deceased was physically and mentally incapable of drawing a cheque on 12 July 1992.

Dr Francis explained that the deceased could not have fully recovered on 3 August 1992. But there was improvement on the condition he was admitted. He would not say that the deceased's condition on 17 July 1992 H was such that he did know he was giving special bonuses to his employees.

On 22 July 1992, the condition of the deceased was stable. On 27 July 1992, the deceased appeared to be the same; the deceased consulted him on his old problems and his indigestion. The deceased was clear and lucid. As far as he could remember, the deceased could understand what he spoke to him. Given the deceased's age, the deceased recovered well. I

Under cross-examination by Mr Yeoh, Dr Francis testified that a lacuna infarct is a small infarct occurring deep inside the brain tissue caused by obstruction to the blood supply. An infarct is the death of an

area of tissue caused by blockage of blood. Due to age and the degenerative process, there was a narrowing of the deceased's blood vessels. There was insufficient blood supply to the deceased's brain — the ventricular system.

He did not record the description of the deceased's hallucinations. 'Generally, examples of hallucination would be seeing persons or objects in the room, something like that. There may also be auditory hallucinations'. If the conditions were right, it was possible that the same set of medication prior to admission would cause the hallucination and confusion to the deceased.

The deceased's prostate problem was detected at Gleneagles Hospital in January 1991; a prostate removal operation was performed at Gleneagles Hospital on 30 January 1991. The deceased's gall bladder was removed by another hospital.

He could not say for how long the deceased had been taking sleeping tablets. In general, sleeping tablets taken over a long period would have a cumulative effect, particularly on the nervous system. Patients taking sleeping tablets over a long period would develop forgetfulness, disturbance of sleep pattern, palpitations and anxiety; a person's thinking might be impaired. Dr Francis Tan agreed that the taking of sleeping tablets would be particularly hazardous to someone as old as the deceased.

Mr Yeoh: What are the tests to determine if a person is of sound disposing mind?.

F. Tan: There is no set formula. It is up to the examiners. These covers general questions, retentiveness, the ability to recall.

In re-examination, Dr Francis testified that it does not necessarily mean that a person with the ability to sign a document has all his mental faculties functioning. If the deceased was not responding to greetings, not able to carry light joss-sticks and starring blankly at his newspapers, it was a sign of Parkinson's disease. Starring blankly at the newspaper is indicative of mild dementia. Senility refers to getting old whilst dementia refers to memory, comprehension and insight. Dementia, old age, degenerative process and sleeping pills would hasten memory loss. However, memory loss is inevitable as one becomes old. A senile confused person might be able to sign cheques if he is not paralysed. However he would not know if the deceased knew what he was signing. The deceased was suffering from conditions and diseases that made him vulnerable to recurrences of symptoms of confusion, memory loss, maybe hallucinations and mental impairment. The stroke could make the dementia worse. That was a possibility.

On 22 July 1992 and 27 July 1992, he saw the deceased for not more than ten minutes. He enquired from the deceased of his health, how he was feeling and the symptoms he was having. The deceased answered him.

Lim Cheng Chuan's testimony may be paraphrased, again it must be in extenso, as follows. He is an Advocate & Solicitor. He was introduced to the deceased in 1989. He is acquainted with Beng Imm and Cheng Liat. He met Cheng Liat in 1954.

A The deceased, a man of few words, wanted things his way. The deceased wanted a provision in the 1989 deed on the absolute use of the trust funds. Cheng Poon also asked to be given that absolute use. He explained to the deceased that the purpose of the trust would be defeated if Cheng Poon was given that power; nonetheless, the deceased insisted on B the provisions in the 1989 deed. The public listed shares stated in the 1989 deed were transferred to the deceased and Cheng Poon as trustees for the Khaw Bian Cheng Trust Fund. However, the deceased instructed that the transfer of the lands stated in the 1989 deed to be held back.

Sometimes towards the end of 1989, Cheng Liat informed him that C the deceased wanted to speak to him. In Cheng Liat's presence, the deceased informed him that Cheng Liat had complained that the 1989 deed favoured Cheng Poon and he (the deceased) wanted to revoke the 1989 deed. He advised the deceased that the 1989 deed was like a gift and could not be taken back, and that he (the deceased) could exercise cl 2 — the deceased disposing off the assets and crediting himself with the sale D proceeds — and nullify the entire 1989 deed. The deceased accepted his advice.

Sometime in 1990, the deceased informed him that he wanted Nik Saghir to prepare a fresh will. The deceased asked him to explain his intention to Nik Saghir. He accompanied the deceased to Kuala Lumpur. E Hamid was also present. Nik Saghir advised a codicil rather than a fresh will. There was no discussion of the 1989 deed. Sometime later, they (the deceased, Nik Saghir and himself) met at the E & O Hotel. Nik Saghir read the codicil to the deceased. The deceased wanted some amendments. Nik Saghir amended the codicil. His office typed the amended codicil. The deceased signed the amended codicil. The signed codicil was handed F to the deceased. He did not make nor did he take a copy of the codicil.

The deceased informed him that he had sold the Batu Ferringhi land and wanted to provide for his three sons. He prepared DB1A(97) and DB1A(100), deeds of settlement that the deceased executed at Pykett Avenue on 24 July 1992. He attested the signature of the deceased. While G Cheng Bok and Cheng Liat were each given a document — DB1A(97) and DB1A(100) — Cheng Poon he was given to understand, was given cash.

The deceased instructed and he prepared the Power of Attorney ('PA') dated 24 July 1992 — DB1A(104). The deceased was troubled by H prospective buyers who wanted to buy Lot 716 Section 10, Georgetown and the deceased said Cheng Poon would handle the sale. Shortly after discharge from LWE Hospital, the deceased instructed and he prepared the PA dated 3 August 1992 — DB1A(107). The deceased said he was lucky he had a mild stroke but he could be bedridden by a further stroke; the deceased wanted Cheng Poon to manage his affairs.

I He knew the deceased had a piece of land at Teluk Bahang. The deceased instructed him to prepare the memorandum of discharge — PB1(290). Shortly after discharge from LWE Hospital, the deceased

instructed him to prepare a transfer of the Teluk Bahang land to Cheng Poon. He prepared and attested the transfer dated 3 August 1992 — DB1F(92). A

In the morning, on 3 August 1992, he received a telephone call (he believed it was from Beng Tatt) requesting him to be at Pykett Avenue to witness the execution of the deceased's wills. He arrived at Pykett Avenue at 4pm. Beng Tatt saw him to the upstairs hall. There, he met the deceased and Howard. Soon after he arrived, Dr Gafoor whom he had not met before arrived. The deceased said Dr Gafoor was his doctor. B

On the table were two bundles of wills. He explained to Dr Gafoor that he would be a witness as well. He asked Dr Gafoor for his opinion on the mental health of the deceased. But the deceased informed them that he had been examined by Dr Tan and that he was certified fit to sign a will. The deceased showed them a certificate — DB1A(166). C

Reading the wills and discovering that five trustees were named, he advised the deceased that only four trustees could be named. The deceased instructed Howard to delete Teik Lim as a trustee and to retype the wills. Howard took all the wills to his room. D

Whilst waiting for the wills to be retyped, he took out the PA — DB1A(107) — and transfer — he had prepared and handed it to the deceased for his signature; the deceased signed both PA and transfer. The deceased instructed Beng Tatt to call Cheng Poon who was downstairs to sign the transfer. Beng Tatt called Cheng Poon who came upstairs and signed the transfer. E

After that PA and transfer were signed by the deceased and Cheng Poon, Howard brought in the 1992 Thai will. The deceased read and signed the 1992 Thai will in their (Lim and Dr Gafoor) presence. Cheng Poon was not around. Beng Tatt was downstairs. He and Dr Gafoor subscribed the 1992 Thai will in the presence of each other and in the presence of the deceased. F

When Howard brought in the 1992 Thai will, it was held together with a paper clip. After he read and explained the 1992 Thai will to the deceased, Howard stapled the 1992 Thai will. It was signed after it was stapled. He personally dated the 1992 Thai will. He dated it wrongly, July instead of August. He made the correction — deleting July and writing August. The deceased, Dr Gafoor and himself counter-signed the correction. G

He and Dr Gafoor did not have their rubber stamps with them. It was agreed that he should take possession of the 1992 Thai will and the deceased would arrange for Beng Tatt to collect the wills from him and take it to Dr Gafoor for his rubber stamp. The deceased wanted his witnesses' rubber stamps to be affixed onto his wills. H

After the 1992 Thai will was executed and subscribed, Howard brought in the Malaysian or US will. He read and explained the second will to the deceased. The deceased read and signed the second will. When the deceased was signing the second will, he and Dr Gafoor were present. They subscribed in the presence of each other and the deceased. The second will was held I

A together with a paper clip. Howard stapled that will before it was signed. Similarly, it was also agreed that he should take possession of the second will and the second will would be rubber stamped in manner agreed for the 1992 Thai will. He personally dated, correctly that time, the second will.

After the second will was executed and subscribed, Howard brought B in the third will. Similarly, it was held together with a paper clip but stapled before it was signed. The deceased executed the third will in their presence. Similarly, he and Dr Gafoor subscribed in the presence of each other and the deceased. He and the deceased read the third will before it was signed. Howard was around; he was moving in and out of the hall. He C did not see Richard. Cheng Poon was not around when any of those three wills were signed.

After execution, they (the deceased, Lim and Dr Gafoor) signed on each page of the three wills. He believed the deceased flipped each page of the wills himself. After the deceased had signed a page, he immediately D passed that page to Dr Gafoor for signature and then to him for signature. That was done before the next page was signed by the deceased and subscribers. The whole bundle, after the execution of a page, was passed to the next signatory. He placed all three executed wills in an envelope that he took with him to his office.

E A week later, Beng Tatt called at his office. He handed the three wills to Beng Tatt. He instructed Beng Tatt to take it to Dr Gafoor for his rubber stamp. A week or two later, Beng Tatt returned to him all three wills with Dr Gafoor's rubber stamp. He placed it in an envelope, sealed and deposited the envelope in his office safe. After the death of the deceased, Cheng Poon, Cheng Bok and Cheng Liat asked him to take out F the wills and read it to them. The 1992 wills, until then, were always in his safe.

Sometime around 3 August 1992, he visited the deceased. He had with him RPGT Forms 1 and 2 and a written election for RPGT exemption. The deceased signed Form 1 and the election whilst Cheng Poon signed G Form 2.

After 3 August 1992, his only contact with Beng Tatt was that one occasion when Beng Tatt came to his office to take the 1992 wills. After 3 August 1992, he never gave any documents to Beng Tatt or anyone else for the signature of the deceased or Dr Gafoor; he personally handed the H agreement on the sale of Lot 44 Section 3, Bandar Jelutong — DB1C(74) — to the deceased. DB1C(74) was executed on 2 December 1992.

At Pykett Avenue, he opened the sealed envelope and read the (1992) wills to Cheng Poon, Cheng Bok and Cheng Liat. They instructed Beng Tatt to make photostat copies. They returned the originals to him. He I returned to his office with the three (1992) wills. A week or two later, Cheng Poon came to his office. Cheng Poon wanted John Khoo as the executors' solicitor. Cheng Poon asked for the 1992 wills. He affixed his rubber stamp and handed the three (1992) wills to Cheng Poon. He

returned the death certificate of the deceased to Cheng Poon. Thereafter, the (1992) wills were never in his possession.

He received the deceased's written instructions — DB1A(1) and DB1A(2) — and wrote the letters — DB1A(4) and DB1A(5) — to Cheng Hum. As instructed, he lodged a private caveat [DB1A(9)] against Cheng Hum's property. He advised the deceased that he had a weak case against Cheng Hum. However, the deceased insisted on the caveat and he files a writ to support the caveat.

The deceased, as he knew of him, was in full control of his mental faculties. He was a quiet man. When he asked him a question, he would directly reply, with few other words. He did not find him forgetful. The deceased after he was discharged from LWE Hospital was alert but his movements were slow. Prior to 3 August 1992, he accompanied the deceased when he consulted Dr Tan.

About a month after Cheng Poon took away the (1992) wills, Cheng Bok came to his office, alone and unannounced. Cheng Bok alleged that the 1992 wills were forgeries. He told Cheng Bok that it was not true. He denied the alleged forgery. He was surprised at Cheng Bok's allegation. That was the only time he saw Cheng Bok at his office.

Shown D11 (a photostat of the second 1992 Thai will), Lim said he could not remember having witnessed D11. 'I have never seen the original'. 'We only executed three wills. This is not a copy of one of them.' 'I never had D11 ... or any copy ever in my possession.' Lim testified that he did not open a file for the three (1992) wills. He opened a file for the estate of Khaw Bian Cheng. When he handed over the 1992 wills, he also handed his office files relating to the Estate of Khaw Bian Cheng to Cheng Poon.

The sale of Lot 44 was not completed but the total purchase price was paid to Messrs Ismail Khoo & Associates before the death of the deceased. The purchaser is waiting for the transfer to be completed.

Lim Cheng Chuan, under cross-examination by Mr Khoo, affirmed as follows. He did not know the deceased or family well. His chief clerk, who is his brother-in-law, had a key to his office safe. The other lawyers in his firm did not have access to his safe.

The deceased had not been to his office. When the deceased first consulted him, it was at Pykett Avenue. Cheng Poon was present. On a few occasions, on matters related to his father's affairs, Cheng Poon had been to his office. Sometimes, the deceased passed documents to Cheng Poon to be handed to him. Cheng Poon was the only person, other than Beng Tatt, who handed the deceased's documents to him. Sometimes, his office would telephone Beng Tatt for documents. His chief clerk could receive documents for his attention.

Lim denied that someone other than the deceased instructed the 1989 deed. About a week after the execution of the 1989 deed, the shares were transferred and the deceased instructed him not to proceed with the land transfer. Cheng Liat's complaint was after the transfer of shares.

Between early 1990 to July 1992, the deceased did not use his legal services. Only one copy of the codicil was signed at E & O Hotel. After discharge from LWE Hospital, the deceased called him by telephone to his house. He prepared both 24 July 1992 settlements.

On 3 August 92, shortly after he arrived, Dr Gafoor arrived. After escorting Dr Gafoor upstairs, Beng Tatt was in his office downstairs.

He read the 1992 wills. When he read the provision on the appointment of five trustees he stopped reading and advised the deceased to make the correction to four trustees. He did not read the rest of the document as it was not necessary.

He read aloud the 1992 wills to the deceased. He also explained some of the provisions of the wills. The deceased went through every page. The deceased instructed Howard to delete Teik Lim as a trustee. Howard prepared the 1992 wills. The 1992 wills were printed at Pykett Avenue. With him, the deceased did not discuss the making a will. 'On hindsight, I should have been more careful (as I was witnessing) a will prepared by a beneficiary. I agree that I exposed myself to an attack on my propriety. However, I maintain that there was nothing irregular.'

Lim agreed that Dr Gafoor should have heard him reading aloud the 1992 wills and should have seen the deceased signing the transfer of the Teluk Bahang and PA. He affirmed that D11 was not one of the wills signed on 3 August 1992. He said he had no knowledge of D11 — 'The signatures on ID11 purportedly mine (are) not mine'.

Lim testified that he affirmed in an affidavit in 22–271–94 [see DB1A(269)] — that his signatures were on D11 — as he thought those signature were his. 'It was similar to my signature, so I said it was my signature.'

John Khoo: I put it to you that (D11) has your signature.

Lim: No. I don't know who prepared (D11). I did not lodge a report on the forgery of my signature on (D11).

John Khoo: I put it to you that you have knowledge of (D11) and you attested (D11).

Lim: I did not attest.

Lim agreed that some pages of the 1992 Thai will bore no signatures of the deceased, Dr Gafoor or himself. 'I am sure each and every page was signed by all three. D2B could have been tampered while it was not in my possession.'

He did not instruct Beng Tatt to take loose documents to Dr Gafoor for signature. About a week after the death of the deceased, he read the (1992) wills to Cheng Liat, Cheng Bok and Cheng Poon. He did not give a copy of the 1992 wills to the other children. But Lim also confirmed his firm forwarded copies of the 1992 Thai will, by letters dated 15 April 1993 and 15 April 1993, to Cheng Bok and Liang Imm.

He handed his file to Cheng Poon who wanted to show it to John Khoo. He took no action to recover his file. He did not know who

prepared D11. He agreed that the 1992 Thai will was tampered. After execution, the 1992 wills were in his possession until it was handed to Beng Tatt for Dr Gafoor's rubber stamp. He did not send D11 to any of the parties.

Under cross-examination by Mr Yeoh, Lim affirmed that he met the deceased on several occasions. The deceased always gave him personal instructions, when they were alone and sometimes when Cheng Poon was around. The deceased was not forgetful. 'Each time I met him, he was clear and lucid and he could answer my questions.' He (Lim) never took instructions from Cheng Poon. Not once did Cheng Poon instruct him on his father's assets.

The 1989 deed was prepared on the instructions of the deceased. However, Cheng Poon intervened and asked to be given the same power of absolute use. Cheng Poon said his brothers would disturb and obstruct his every action if he was not given absolute power. Clause 5 was incorporated to accommodate Cheng Poon.

The deceased who agreed that the 1989 deed was not fair to Cheng Liat, wanted to revoke the 1989 deed. In early 1990, the deceased said he wanted to change his will but did not specify the will concerned. He was at E & O Hotel to witness the codicil.

He prepared the two settlements dated 24 July 1992 solely on the instructions of the deceased. Cheng Poon did not instruct him. A similar settlement was not given to Cheng Hum or other children as the deceased said he wanted to give a million each to Cheng Liat, Cheng Bok and Cheng Poon from the sale of the Batu Ferringhi land; that million was reduced to RM866,000. The deceased wanted to give cash to Cheng Poon.

When the PA dated 24 July 1992 was signed, he knew that the deceased was just discharged from LWE Hospital. Cheng Poon did not instruct him on the PA. On 24 July 1992, he was instructed to prepare the PA dated 3 August 1992. The deceased did not explain why he had given a limited and then a general PA. Cheng Poon did not instruct him on the transfer of the Teluk Bahang land. The deceased did not give his reason for the transfer of the Teluk Bahang land.

He did not consider it odd or strange that the deceased instructed him on twoseparate PAs, one transfer, two settlements and executed three wills within 24 July 1992 to 3 August 1992. 'The deceased wanted to settle his earthly affairs. He was a sick man.'

He did not receive any instructions on the preparation of the 1992 wills. He merely attested the signature of the deceased. He had no doubts on the deceased's mental ability but he asked for Dr Gafoor's opinion as he was a doctor. Before Dr Gafoor could respond, the deceased produced Dr Tan's certificate.

After the deceased signed a page, he had to rest his hand. They used the time to sign that page. It would be difficult for the deceased to continually sign an entire document. The deceased needed to rest his hand or his hand would tremble. On 3 August 1992, the deceased was physically weak.

A The (1992) wills were in his office safe for about a week before it was handed to Beng Tatt. Before that, he was waiting for Beng Tatt. There was no urgency to have the rubber stamps. Lim could not explain why his rubber stamp was not affixed on the 1992 wills before it was handed to Beng Tatt.

B Cheng Poon asked for the 1992 wills a few days after it was read. He kept the 1992 wills as the deceased had asked him, immediately after the execution of the 1992 wills, to keep the (1992) wills. He read the 1992 wills to whoever was present at Pykett Avenue. It did not occur to him to call the other beneficiaries, although he knew who they were.

C In 1990, he accompanied the deceased to see Dr Tan. He could not remember the conversation.

The deceased said he wanted to sell his (Ayer Itam) land as he needed the money. Because Cheng Hum had refused to accept the proposal in DB1A(4), the deceased instructed him, as leverage, to issue DB1A(5). Cheng Poon did not instruct him on DB1A(4) but he believed Cheng D Poon was present when the deceased instructed him. He was aware that Cheng Hum was not inclined to sell the Ayer Itam land. Cheng Poon said he had a buyer for one of the Ayer Itam lands.

The deceased was strict with his children but he was not mean or hard on them. The deceased loved his children but was tight fisted. He agreed E that DB1(A)(2) — the instructions of the deceased to caveat and to claim Cheng Hum's house — was out of character. He would not know if Cheng Poon had instigated the deceased to send the letters DB1(A)(1–2). He did not assist Cheng Poon to get the better of his brothers. He did not disclose the existence of the 1989 deed to Cheng Liat. He disagreed that Cheng F Poon and his sons were instrumental in formulating the 1989 deed. He did not know why the deceased did not inform Cheng Liat of the 1989 deed. He agreed that Cheng Liat told of the 1989 deed would have alerted the deceased earlier of the purport of the 1989 deed. To achieve the termination of the 1989 deed, it did not occur to him to advice the beneficiaries of the 1989 deed to renounce their interests. He did not allow Cheng Poon to G instruct him on behalf of his father. He denied Cheng Poon instructed him from the time of the 1989 deed to the last document he prepared. He maintained that he gave his entire file to Cheng Poon as Cheng Poon wanted to show it to John Khoo. He denied Cheng Poon instructed him to keep the 1992 wills.

H

Mr Yeoh: But at the E & O Hotel were you not given a copy of the codicil? How (would) you explain that the three wills were entrusted to you?

Lim: The deceased wanted me to keep the wills.

I Agreeing that his testimony was diametrically opposed to Dr Gafoor's, Lim maintained that his testimony was what had actually happened. He said that Dr Gafoor and Beng Tatt's testimony was not true.

The deceased's action against his eldest son and his caveat against his eldest son's house were out of character. Against his advice, the deceased insisted on the caveat.

He was positive that he sent a copy of the 1992 Thai will and not a copy of the second Thai will to the beneficiaries. He said he did not have a copy of D11. Shown the original of D11, Lim agreed the second 1992 Thai will had his signature and rubber stamp. He agreed that the second 1992 Thai will was the original of D11 and that D11 had his signature.

Mr Yeoh: Then can you explain how this fourth will dated 3 August 1992 came about?

Lim: The first Thai will had an error in the date, but I corrected it. Dato Khaw was not happy and he arranged for the second Thai will to be typed, ie 2D. The contents were the same as the first Thai will — DB2B. A date was fixed for me and Dr Gafoor to be present. I went a few days after 3 August 1992. Dr Gafoor did not turn up. We waited and yet he did not turn up. Dato signed 2D and he asked me to sign. I signed and he said he would wait for Dr Gafoor to sign as a witness. 2D was there when I reached the deceased's house. I did not prepare 2D. 2D was kept by the deceased. I now say I cannot remember whether I had given ID2D to Cheng Bok. I now say that 2D is genuine.

In re-examination, Lim Cheng Chuan explained that when he discovered, while testifying on 20 March 1997, that two pages of the 1992 Thai will did not have his signature, he hastily concluded that those two pages must have been tampered. He said he had no 'personal knowledge that it was tampered'.

Mr Koh: Could (there) be any other explanation for the signature not being on those 2 pp?

Lim: Perhaps the deceased flipped more than 1p.

The instructions to him, except on the singular occasion when Cheng Poon interceded, were solely from the deceased. He forgot about the second Thai will (D2D). When he arrived at Pykett Avenue, he was not aware that Howard prepared the wills. He was only aware when Howard took the wills for amendment. The file (LA/854) he gave Cheng Poon had the trustees as his clients; Cheng Poon was one of the executors.

Dr Gafoor testified that he was called by telephone, in the afternoon, on 3 August 1992, to Pykett Avenue. He thought his medical attention was required. From 1990 to 1992, the deceased was his patient. At the upstairs hall, Lim whom he had never seen before told him that he was to witness the execution of the deceased's wills. Also present were the deceased, Richard, and Beng Tatt by the side of the deceased. He did not see Howard. There were papers on the table. They (the deceased, Lim and Dr Gafoor) signed those papers. Then further papers 'came' that they (the deceased, Lim and Dr Gafoor) signed. There were a number of trips, three Dr Gafoor believed, in which loose sheets were taken out from a room. He could not recollect the person who brought those loose sheets. 'It was not attached together or stapled together.' The wills were not read to the deceased. On 12 August 1992 and 14 September 1992, Beng Tatt brought him loose documents for signature. Those loose sheets bore the signature of the deceased and Lim. There were many loose sheets. 'It was a thick

A bundle.' On both occasions, he signed those documents in the absence of the deceased and Lim. On both occasions, Beng Tatt told him that the previous documents had mistakes and amendments were required. At that time, he did not think it was irregular. Dr Gafoor said, he would not have signed those documents if he knew it was irregular. On both occasions, he also affixed his rubber stamp on those documents. Dr Gafoor affirmed B that Cheng Bok and Cheng Liat came to see him and that he related the events of 3 August 1992, 12 August 1992 and 14 September 1992 to them. Dr Gafoor said that he saw the deceased and Lim for the last time on 3 August 1992.

Under cross-examination by Mr Koh, Dr Gafoor testified that Cheng C Poon was also present on 3 August 1992. Beng Tatt was present all the time. He did not have his rubber stamp at that time. Later, documents were sent to him for signature and rubber stamp. On 3 August 1992, he did not think there was anything wrong with documents in loose sheet form. Sometime in 1994, Cheng Bok and Cheng Liat came to see him; he D told Cheng Bok that the documents were in loose sheets. 'Before 1994, it did not bother me. I was asked to sign and I signed.' Dr Gafoor disagreed that Lim had read the wills to the deceased. 'The deceased read it himself.' Dr Gafoor disagreed that Cheng Poon was only there for a short while. 'He was there throughout the signing of the wills.'

Under cross-examination by Mr Yeoh, Dr Gafoor said that Lim asked E him, as soon as he reached Pykett Avenue, to witness the execution of the deceased's wills. He did not inform the deceased that he was asked to witness his wills. When he saw the deceased, he greeted the deceased and he returned his greeting.

F No one read the wills to the deceased. The deceased held the wills and look at it. He did not read aloud. The deceased asked no questions. No one said anything to him..

In re-examination, Dr Gafoor said that nothing was said by the person bringing in the loose sheets for signature. He could not remember the particular loose sheets signed in his clinic. 'The deceased did not look at G all the loose sheets. He looked only for a short duration'.

When he was recalled, Dr Gafoor testified that Athe deceased only signed a will. 'I did not see any other documents being signed by any other person.' 'Maybe there was some other event that I did not witness'.

H *Other witnesses*

Teoh Eng Chye, 42, the Deputy Branch Manager of the BBMB, Pulau Tikus Branch testified that PB1(144–157) were statements on the bank account of Bok Eng, Cheng Poon and the deceased. PB1(290–323) were documents relating to the overdraft of the deceased secured by a charge of I Pegangan 676 and 678, Mukim 2, Daerah Barat Daya, Pulau Pinang (Teluk Bahang land). PB1(324–336) were copies of cheques drawn on the deceased's account 1540021212. The deceased had three accounts: (i) two normal current accounts; and (ii) juara gold account. The overdraft was

granted to account 1540006019. PB1(323) and PB1(324) showed that a sum of RM866,000 and RM197,000 were drawn out from the deceased's current account 1540021212 and credited to the joint account of Cheng Poon and Bok Eng. PB1(325–336) were monies drawn from the deceased's account and credited to the persons named in the cheques.

Under cross-examination by Mr Koh, Teoh testified that his branch granted an overdraft facility of RM1.5m to the deceased. Before it was redeemed, there were attempts to sell the Teluk Bahang land.

> My branch corresponded with M/s Nik Saghir acting for ... I cannot remember ... as the loan by that time was getting bad.
>
> In my branch, when a customer draws an unusually large amount in favour of a third party, we usually communicate with the drawer to ascertain the genuineness of the cheques. Looking at PB1(325) I would say that the drawee saw the manager. The cheque has the signature, approving the payment out, of the manager. The cheque PB1(325) was paid to the persons named. No one else received the amount.

Chew Cheng Leong, 32, the manager of Arthur Andersen & Co ('AA') of Pusat Bandar Damansara, Kuala Lumpur, testified that for the period January to December 1996, he was entrusted by the receiver and manager of the estate of the deceased to take charge of the administration of the estate of the deceased, to assist in determining the value of the estate, its incoming and out goings, and to preserve the assets.

He visited Pykett Avenue, where the books and records of the estate were kept. The occupants of Pykett Avenue handed over those books and records. AA has most of the documents. Cheng Poon and Bok Eng have not surrendered the personal valuables of the deceased and Ooi Geen Peen to AA. When he was at Pykett Avenue, he was confined to the office.

Based on Cheng Poon's account, AA prepared PB4(1–4); most of the expenses for the period 1 January 1993 to 4 October 1993 were not supported by documents. Despite several requests, Douglas Newman and Cheng Poon have not supplied the documents supporting the expenses of the US and Thai estates.

The estate has 43 properties listed in the 1992 wills. Solely, jointly or beneficially, the Malaysian estate has 40 other properties listed in P19. Despite several requests, the titles to the landed properties in Thailand have not been delivered to the receiver and manager or AA. The first to defendants refused to deliver vacant possession of Pykett Avenue. They denied that the receiver and manager had a right to possession of Pykett Avenue. He had access to the Malaysian accounts. He had never seen the probate granted in Thailand.

In October 1996, the receiver and manager instructed AA to abandon all attempts to take possession of the Thai and US properties.

The first to third defendants have not handed over the correspondence from the Thai manager. By and large, the correspondence from the US or Thailand to the estate and received by the first to third defendants and or their solicitors, after the appointment of the receiver and manager, were

not handed to the receiver and manager or to AA. The receiver and manager received the rentals and dividends for the period after December 1995. The receiver and manager or AA have not received other monies of the Malaysian, US or Thai estates. He was not aware that the deceased had expensive antiques or paintings.

Under cross-examination by Mr Koh, Chew Cheng Leong testified that AA took steps to take over the administration of the US assets. On AA's instructions, Messrs Ong & Kandiah corresponded with Douglas Newman. Their correspondence were not responded within good time. The Thai manager, Tamarak Chintaphorn, furnished part of the Thai accounts. 'I would say, yes, the cooperation was not forthcoming. I agree that after I had the meeting with Tamarak and after I proposed the site visit, the defendants left it to my firm to take steps to take possession of the Thai assets.'

The issue of the inventory of the personal belongings of the deceased — jewellery, antiques and paintings — was raised many months after the appointment of the receiver and manager. At about the time that AA was appointed, AA raised the issue of the possession of Pykett Avenue with the first to third defendants. AA conducted an inquiry into the US assets, but those assets have not been ascertained.

Under cross-examination by Mr Foo, Chew Cheng Leong testified that he wrote in early 1996 for details of the US assets. Raymond Ooi & Co, directed him to Douglas Newman. A list of the US assets has not been received.

Under cross-examination by Mr Yeoh, Chew Cheng Leong testified that the deceased had 32 properties, in part or in whole, in Penang, which were not listed in any of the wills of the deceased. AA had not inquired into the personal valuables of the deceased. AA failed to obtain delivery of the personal effects and valuables of the deceased from Cheng Poon.

In re-examination, Chew Cheng Leong testified that AA could not get a complete picture of the estate. It was difficult getting the information on the assets in Penang, Thailand and US. AA received partial cooperation. The Thai manager only gave an income and expenditure account for one month.

Under further cross-examination by Mr Koh, Chew Cheng Leong testified that AA applied to the first to third defendants for details of the personal valuables of the deceased. Cheng Bok informed AA that the deceased left valuables. In further re-examination, Chew Cheng Leong reaffirmed that the details of the personal valuables of the deceased were not given to AA.

In answer to the court, Chew Cheng Leong said, AA has no reason to suspect or indeed has discovered any other properties of the deceased in Thailand or US. that are not already disclosed to the receiver and manager, AA or to the plaintiffs.

Yeoh Keat Chye, a weight lifting instructor, testified that from 1988 he was 'the deceased's driver and night security'. He said, he is still employed by the estate. 'I report each day to Cheng Poon.'

The deceased was a man of authority and few words. Beng Tatt handed him DB1(B)(9). The deceased said to him that Cheng Liat was not allowed into the house. Normally, he would drive the deceased to the Thai and Indonesian Consulates, watch shops, temples and on Sundays to restaurants. He testified

> Sometimes, the deceased engaged in conversation with me. Normally, Teoh Say Bee would be around. Sometimes, the deceased would point out to us his properties as we drove passed. At the temple, Say Bee lit the joss-sticks for the deceased. Usually, the deceased would give his directions. One road I was instructed not to pass was Victoria Green Road, where Cheng Liat stayed.

There was no difference in the deceased, prior to admission and after discharge from LWE Hospital. The deceased 'looked all right even when he went to Singapore in March 1993.'

He spoke when he left for Singapore. The deceased told me that if anyone would look for him to tell them that he is in Singapore receiving treatment.

On 15 August 1995, he met Cheng Bok and Cheng Liat. They spoke to him about the Batu Ferringhi land. 'Cheng Bok related a few things for me to convey to Cheng Poon. He reported the matters spoken to him in D1A(341).'

Under cross-examination by Mr Khoo, Yeoh Keat Chye testified that Cheng Poon 'introduced him to work for the deceased'.

Cheng Poon is not a partner of Super Gym. 'I do not know why Cheng Poon's photograph is hanging in Super Gym.' 'Presently in the daytime, I don't work. At night I work in the Super Gym and as a bouncer at Party Box Discotheque.'

He never worked for Bok Eng. 'Presently, once a month, I drive Cheng Been to LWE Hospital. I still have a room at Pykett Avenue.' His contact with the deceased was less than Say Bee's. Once, he was detained for four nights by the police for a 'brawl'.

It took him 13 days to lodge his report — D1A(341) — as he was waiting for Cheng Poon's instructions. He agreed that he would not have lodged that report if Cheng Poon had not instructed him. He disagreed that Cheng Poon dictated his report.

Under cross-examination by Mr Yeoh, Yeoh Keat Chye testified that Say Bee, not the deceased, called him to the deceased's room. Cheng Poon was not around. He knew, after receiving 1(B)(17) that the deceased did not like Cheng Liat. Once, after receiving DB1(B)(9), the deceased instructed him not to pass Victoria Green Road. In re-examination, Yeoh Keat Chye said that his room in Pykett Avenue was formerly a shed.

Tan Beng Hin, 62, a former health inspector of the MPPP and a pensioner, testified that Beng Imm married his wife's cousin-in-law, one Dr Edwin Yip. 'My wife is Lim Poh Suan. Edwin Yip is my wife's brother's (Lim Eng Chye) brother-in-law. Edwin's sister married my wife's brother.'

A In 1991, he and his brother, Tan Beng Seng, were involved in the sale of Batu Ferringhi. 'The others were Hamid Merican, Cheng Poon, and a friend of my brother. The deceased gave him 10% of the total sale proceeds to be shared by all five. He received ¼ of the 10%. DB1(E)(127) was his receipt. Cheng Poon received ¼ to be shared with Hamid Merican. His brother and his friend received ½ of the 10%. He received his ¼ of the B 10% by or before 18 June 1992. It was paid in cash. Bok Eng arranged the payment to him and to the others.

A few days before the deceased was admitted to LWE Hospital, he stayed with the deceased at the Shangri-La Hotel, Kuala Lumpur. In November 1992, he accompanied the deceased to Taiwan and to the C States. On that trip, the deceased was quiet. At the States, the deceased said that his land was on a slope and only the rich would want land on a slope. On that trip were Cheng Poon and wife, himself and wife, Teik Ewe and the deceased. The deceased needed some assistance to dress himself. The deceased ordered soft food suitable for him. The deceased was D wearing dentures. He was not wearing braces. At times, he changed his orders for his food. He was at the funeral at Singapore. Cheng Poon was not in charge of the funeral.

Under cross-examination by Mr Khoo, Tan Beng Hin said he was not a licensed estate agent. On the trip from Arizona to Port Worth, Texas, the deceased could not control his bowels and soiled the pampers he was E wearing. He cleaned the deceased.

Under cross-examination by Mr Yeoh, Tan Beng Hin said he did not know who determined the 10% commission and he did not know that a 10% commission was above the norm. Tan Beng Hin was not re-examined.

Cho Choo Meng, 42, a chartered accountant and a director of Price F Waterhouse, Penang, testified that Howard instructed him, by letter dated 4 April 1997 from Messrs Murad & Foo, to prepare and determine the accounts of the deceased's estate in the States. He enlisted the assistance of Price Waterhouse of Phoenix, Arizona, who since has produced a report dated 29 April 1997 on the accounts. He perused that report and prepared G his summary (D37) of the US accounts. From what he could elicit from the bundles of documents in court, D37 is a true and accurate summary.

The total taxes in the States were US$91,821.89 and US$6,667.84. The professional fees amounted to US$56,807.34 and US$13,224.75. The estate was in deficit — US$48,697.51.

H *The Thai lawyers'*

Isdakom Kasemsri, 47, an Attorney at Law of 79 Sukhabhidan Road 3, Bangkok, Thailand testified that in general, under the Thai Land Code, only Thai nationals or Thai companies can own lands in Thailand. Non-I Thais holding lands before 1 December 1954, the effective date of the Thai Land Code, are entitled to their lands without restrictions. But those lands, after 1 December 1954, cannot be inherited by non-Thai beneficiaries. The Thai Land Code provides that such non-Thai beneficiaries shall dispose of those lands within a year as prescribed by the

Director General of the Land Department, and in default, the Director General is empowered to dispose off the land, by private or auction sale, within the next two years. In practice, the one year usually commences from the day the beneficiaries become entitled to the property, that is, according to the Civil Code, upon the grant of administration to administrators.

A company incorporated in Thailand but owned by non-Thais cannot own lands in Thailand. If it is 51% foreign owned, it will be considered a foreign company. If Thai ownership becomes less than 51%, the company would be deemed a foreign company and its lands would be subject to sale.

The Director General, if he has knowledge that the deceased's beneficiaries are non-Thais, may enforce the provisions of the Thai Land Code and compel the sale of the lands of the deceased in Thailand. In his opinion, even if a will is contested, he would advise the trustees named in the contested will to apply for administration. He agreed, if the Director General had not issued a notice, that the deceased's lands are safe. He agreed, since four years have passed since the death of the deceased, that there was no urgency to apply for administration. In 1993, with the beneficiaries all being non-Thais, he would advise an application for administration, even though there was no impending notice of sale by the Director General.

Prateep Pattana-Amora, a lawyer practising in Hadyai and residing at 573 Supasarurang San Road, District of Hadyai, Songkla, Thailand testified that Enon-Thais may only own lands as provided under ss 85–88 of the Thai Land Code. A non-Thai is entitled to inherit under each category of use provided in s 87. A person permitted to inherit is not compel to sell the land. However, if a non-Thai inherits more than the permitted acreage, he must sell the excess, because of the limits in s 87, under s 1732 of the Civil and Commercial Code. There is no time prescribed for the disposition of the excess land. Section 94 applies only to lands acquired unlawfully and not to inherited lands; an acquisition by a non-Thai exceeding s 87 is not an unlawful acquisition.

On 30 April 1997, at the Commercial Office, Trang, Thailand, he conducted a search of Khaw Bian Cheng Nararong, Wife, Relation & Friends Ltd. It was listed in the Trang Province as a Thai company. There is no time limit for the distribution of the deceased's shares in Khaw Bian Cheng Nararong, Wife, Relations & Friends Ltd. On 30 April 1997, he conducted a search of the deceased's 147 lands in Trang Thailand (see PB1(59–64). Thirty-five properties had been sold — nine belonging to Bian Cheng Naranong Pte Ltd and 26 to the deceased. Lot 114 was charged and then discharged on 18 April 1997. Lot 114 is still in the name of the company. Those 36 (35 and 1) dealings were those in his summary DB2(B). He obtained duplicates of those 36 dealings from the Kantang Land Office — DB2(B)(1–430).

The charge of Lot 114 was created under the company's seal. Based on his knowledge and experience, the value of one rai of commercial land in Trang, during 1990 to 1993, was Baht25m. One acre is equivalent to

2.5rai. Vacant commercial land in Trang was worth Baht25m for one rai. One Chintapol Thammasak's signature signed for the vendor in almost all the agreements of sale. None of the PAs used to effect the transfer were certified by the Thai Embassy, Thai Consulate or Notary Public. All sales were lower than the market price. Each building lot was worth Baht1.5m.

> Mr Koh: I suggest ... land transactions are routinely registered in Thailand based on PAs which may not have been executed in Thailand although they purport to have been executed in Thailand. I suggest ... the Land Registering Authority would register the documents without investigating and therefore short cuts would be taken to overcome the inconvenience of PAs. being executed in Thailand.
>
> Witness: At the time when the PA was signed, the witnesses must be present. It must be certified by the Embassy.

He tendered, inter alia, copies of documents — D40(1–6) — relating to a meeting at Pykett Avenue on 12 July 1996, of Bian Cheng Naranong Ltd attended by Cheng Poon Naranong, Richard Khaw Naranong, Howard Khaw Naranong to mortgage Lot 114 to the Thai Commercial Bank, Trang Branch for Baht1m and an agreement dated 28 August 1996 — D40(14–15).

Submissions

Mr Koh Kek Hoe

Mr Koh delivered a long commentary on the law relating to wills, the Law relating to gifts and advancements as well as on the evidence.

Mr Koh confirmed: (i) that Cheng Poon, Richard and Howard endorsed the consolidation/joint trial of all the actions herein save on their right to challenge Cheng Bok's locus standi in the recovery action, and (ii) that the outcome of this trial would determine the fate of 32–159–93. However, he said, 'should this court not find in favour (of the 1992 wills), a separate petition for letters of administration or probate would have to be presented'.

He continued:

> The declaration that the deceased died intestate is not available as the court would have to investigate other wills which might exist and the beneficiaries to those wills have not been cited. If this court should find against both the 1990 and 1992 wills, all parties would be free to propound other wills in separate proceedings; Cheng Poon, Richard and Howard, could bring fresh proceedings propounding another will.

Want of proper execution, fraud and undue influence in the execution of the 1992 wills were alleged. The testamentary capacity of the deceased was challenged. Cheng Hum and Grace made similar allegations. However, the formal validity of the 1992 wills was not challenged; it was only alleged that the 1992 wills were executed in loose sheet form.

Section 5 of the Wills Act 1959, in pari materia with s 9 of English Wills Act 1837, leans towards upholding and not striking down the 1992

wills because of formal defects. The bare execution of a will, where the testator is shown to be rational, is sufficient to prove the will. A

Where there is a proper attestation clause, the general proposition is that due execution is presumed even if the attesting witnesses have no recollection of having witnessed the will. 'That of course is a rebuttable presumption.' B

Where a testator had read a will, in the absence of fraud, there is a strong presumption that the testator knew and approved of the will. That presumption can only be set aside by the clearest of evidence. That Dr Gafoor was entirely an 'outsider' was strong evidence of the absence of fraud and 'clandestinity'. At most, the benefit to the person preparing the will is only a circumstance for some suspicion. Vague suspicion must not be freely indulged. 'Suspicion to invalidate a will must be that grave as to override all other evidence propounding the will.' C

Every person is presumed sane until proved otherwise. The deceased was sane and must be presumed sane. The deceased conducted his life as a sane man and his acts were consistent with a composed mind. His testamentary capacity was certified by Dr Tan. 'The court should look at the procedural acts and conduct of the deceased; not the opinion of occasional witnesses.' Dr Tan supported the case on the testamentary capacity of the deceased. His five certificates could not be doubted. That the deceased possessed Dr Tan's certificates evinced a sound and logical mind and a sense of responsibility. The changes to the ensuing wills/ codicils of the deceased were consistent with the change/s related to Dr Tan. The visits to Dr Tan showed that the deceased understood he was giving property to one or more objects of his regard and his concern. The deceased could recollect the claims of his children. He could recall his executors. He know whom he wanted as executors. He gave reasons for the changes of executors. He could recall a prior discussion. The provisions of the 1992 wills were corroborated by the matters related to the doctor on 24 July 1992 and 3 August 1992. The deceased, if not of a sound disposing mind, could not have had his conversations with Dr Tan and Dr Tan could not have known of the changes to the wills/codicils if the deceased had not related it to him. 'The deceased had a full grasp of his assets and legatees ... The visit of 3 August 1992 was not orchestrated by the first to third defendants.' The last visit 27 January 1993 confirmed that the deceased remained of sound mind. D E F G

If there was intention to defraud, an independent witness — Dr Gafoor — would not have been a witness; an 'outsider' would not have been invited instead to witness the 1992 wills. It was not shown that the deceased in the ordinary affairs of life was under the control and or dominance of Cheng Poon, Richard or Howard. 'These are no facts to arouse any suspicion in this case.' H

Parkinson's disease was not diagnosed. Dr Tan made it clear that one who suffers from Parkinson's disease is not necessarily incapable of making a will. 'The deceased recovered ... from whatever he was suffering.' The follow-up visits (22 July 1992 and 27 July 1992) showed that the deceased I

A was clear and lucid and was in control of his faculties. The doctors did not support the case that the deceased did not have a sound disposing mind. The evidence is preponderantly in support of a sound disposing mind.

Medical evidence on the testamentary capacity of the deceased cannot be expected to be in absolute terms; the deceased was an elderly man who B had suffered a stroke. The doctors' evidence, based on actual examination and observation, outweighed all hypothetical comments. Greater weight must be given to observed facts than to opinions based on facts observed by others.

Cheng Bok and Cheng Liat, seeking to enforce the 24 July 1992 C deeds, admitted to the sound mind of the deceased. It was not reasonably explained why the deceased after January 1992 was not of sound mind. There was no case of an unstable mind at any given period of time. There was no sufficient evidence that the deceased was not of a sound disposing mind.

Whatever evidence adduced did not support a case of fraud in the D making of the 1992 wills. The 1990 wills/codicil were not to rectify fraud in the making of the 1989 deed. 'If there was fraud, why (would) Cheng Poon be given greater powers in the 1990 codicil. Fraud was not made out.'

The deceased could not have been deceived into signing a (1989) E deed. The deceased knew he had signed a (1989) deed as he implemented the 1989 deed — the transfer of assets to the trustees named in the 1989 deed — within a week of its execution. A will was made on 1 February 1989; it was unlikely that the deceased could have intended another will in that same year. Surely, the deceased intended the 1989 deed.

F The provisions of the 1989 deed might have angered the deceased. But that anger, nonetheless, was not evidence that Cheng Poon deceived the deceased. The provisions of the 1989 deed should not be automatically attributed to Cheng Poon's fraud. The deceased could have been angry because Cheng Poon was getting an unfair share and not because Cheng Poon had deceived him.

G The allegation that Cheng Poon attempted to secure for himself, by the 1989 deed, all the properties of the deceased was unfounded. To do that, Cheng Poon would have to secure the transfer of the properties not listed in the 1989 deed. And that would not be easy, as the deceased would not even transfer the five properties listed in the 1989 deed.

H Both Say Bee and Beng Tatt did not testify that they summoned the attesting witnesses on Cheng Poon or Bok Eng's instructions. On 3 August 1992, the deceased informed the doctor of his wish to make a fresh will. All that supported that the 1992 wills were made voluntarily.

The deceased, who was of sound mind, could not have been forced I into signing the 1992 wills. Say Bee testified that the deceased told him in the morning of 3 August 1992 that he would be going to the Penang Hill house. Therefore, the deceased was able to give instructions on 3 August 1992. Dr Gafoor testified that the deceased greeted him. Dr Gafoor

confirmed the deceased read the 1992 wills. That was clear evidence of the sound mind of the deceased. Dr Gafoor did not testify that the deceased on 3 August 1992 appeared not to be of sound mind. The 1992 and 1990 wills were not that different to have induced fraud.

Sound mind is the basis upon which all is to be judged. Once that issue is determined, the truthful witnesses could be separated from the untruthful witnesses. Beng Tatt testified that the deceased asked him to stay. Dr Gafoor also said that he heard the deceased asking Beng Tatt to stay. Say Bee said the deceased asked him to go to the Penang Hill bungalow. All those acts were consistent with a sound mind. There was overwhelming evidence of a sound mind while there was no evidence to the contrary.

The legal requirements on the 1992 wills were met. The deceased signed the 1992 will in the presence of two witnesses. Section 5 did not require the papers constituting the 1992 wills to be bound. On 3 August 1992, there were valid sets of wills.

If the deceased was of sound mind, it was not probable that Beng Tatt was truthful on Howard taking the safe keys and Howard opening the safe.

Admittedly, Lim Cheng Chuan who denied the existence of a second 1992 Thai will was forced to admit that his signature was on the second 1992 Thai will. But Lim Cheng Chuan explained why there were two Thai wills — there was a mistake in the date, on the cover and on the end page. 'It was a plausible explanation.' Lim Cheng Chuan is a solicitor. It might have been awkward for him to readily admit that the second 1992 Thai will was signed without the joint presence of the witnesses. 'That would be the explanation that I would put.'

> Lim Cheng Chuan denied D11 and 2D. He denied because he was embarrassed. I concede, with regard to D2D, that the evidence was that 2D was sent to Dr Gafoor for signature but not in the presence of the deceased and Lim Cheng Chuan. D2A — D2C remained intact. It suffered not the same defect. I concede 2D does not meet the requirement of s 5.

Dr Gafoor was not reliable on the events of 3 August 1992 — he said that Richard was present but Richard proved he was in Kuala Lumpur. The second 1992 Thai, not the 1992 wills, was sent to Dr Gafoor for signature. Cheng Poon, Richard and Howard could not prove by direct evidence that the 1992 wills were not substituted; however, taking all the circumstances into account, the court should not conclude that the 1992 wills were substituted.

In content, the second 1992 Thai will was not different from the first 1992 Thai will. There was no evidence that whatever document was signed by the deceased after 3 August 1992 was forced out of the deceased. In September 1992, when loose sheets were said to have been signed, Howard was not in the country. The evidence did not point to Richard or Cheng Poon as the makers of the second 1992 Thai will. There was no evidence that the deceased was made to sign any document after 3 August 1992. There was no evidence that the 1992 wills had been tampered.

There was nothing wrong in Howard preparing the 1992 wills. It was probable that the deceased would ask Howard, his favourite grandson, to prepare his wills.

There need not be a finding that the pages of the 1992 wills were substituted. If the deceased was of sound mind and in control, then the events on 1 August 1992 as related by Beng Tatt must be false, as the deceased would not have arranged for the execution of (the 1992) wills fraudulently prepared and without his approval. 'In other words, he did instruct the preparation of the 1992 wills. Beng Tatt's account of the safe keys could not be true. Beng Tatt's evidence must be received with caution.'

If Lim Cheng Chuan's version is accepted, and loose sheets were not signed after 3 August 1992, the evidence was entirely in favour of the execution of the 1992 wills, even if Dr Gafoor could not identify the particular pages of the wills.

Further documents were sent to Dr Gafoor for signature. Lim Cheng Chuan admitted that he sent the second 1992 Thai will to Dr Gafoor for signature. On those two admitted facts, the plaintiff built their case.

Cheng Poon, Richard and Howard had to prove on a balance of probabilities that the deceased executed the 1992 wills. The court need not infer that the 1992 wills were substituted, as Lim Cheng Chuan explained that he sent the second 1992 Thai will to Dr Gafoor and that the second 1992 Thai will was the document signed after 3 August 1992.

There was some evidence, if accepted, that may cast a doubt sufficient for the court to find that the 1992 wills had not been proved. However, it does not follow, just because the 1992 wills were not proved, that fraud was proved. Fraud must be proved beyond a reasonable doubt and not by default. Lim Cheng Chuan's evidence was beyond the first to third defendant's control. He was a witness of the court and not of the party who summoned him. As inexcusable as Lim Cheng Chuan's conduct might have been, the first to third defendants should not be made to suffer on his account. The 1992 wills were not orchestrated and the events after 3 August 1992 could not be approached with suspicion. Beng Tatt's version of the events on 1 August 1992 was a made-up story.

Since the wills 1992 was regularly executed, the events after 3 August 1992 should not arouse suspicion. Lim Cheng Chuan was the deceased's solicitor. He might have been hiding the fact that he was party to the second 1992 Thai will. He might have been foolish to have disavowed the second 1992 Thai will. He was trying to protect his reputation. He was not protecting the first to third defendants. Other than Lim Cheng Chuan's evidence and the fact that Lim Cheng Chuan reversed his stand on the second 1992 Thai will, there was no other evidence to view the 1992 wills with suspicion. The 1992 wills were sent to Dr Gafoor for his rubber stamp and not signature. The second 1992 Thai will was sent to Dr Gafoor for his rubber stamp and signature. Dr Gafoor was not lying but his recall of events was weak. The second 1992 Thai will was executed after 3 August 1992 although dated 3 August 1992. That the provisions of the

first and second 1992 Thai wills were identical supported Lim Cheng Chuan's explanation. The second 1992 Thai will was not for interpolation. It was only to tidy up. A

On the 'inter vivos payments and gifts', Mr Koh submitted that a transaction, where a father purchases property or transfers property to his child, does not create a resulting trust; it is an advancement or gift to the child. The burden is on the other party to rebut the presumption of advancement or gift. The presumption is not rebutted even though the grantor retains the possession and benefits of the gift during his lifetime. A donor's acts and declaration subsequent to the transaction are not admissible in favour of the donor against the donee. The Teluk Bahang land was a gift — for love and affection. That presumption had not been rebutted. The deceased could have inserted in the transfer form that Cheng Poon was holding on trust. 'Undue influence' is to prevent victimisation but not to save donors from folly. The plaintiffs must prove that Cheng Poon, Richard and Howard were in an actual position to dominate. In the case of a father and son, there is no presumption of undue influence. The fact that the donor is old or weak does not raise a presumption of fraud. B C D

On date of death, the deceased had only RM14,000 cash. But that was the nett cash position — Richard testified that the deceased had more than RM250,000 ready cash (Citibank Deposit less Citibank Overdraft leaving RM134,000 and the RM140,000 withdrawn by Cheng Poon). Cheng Poon and Richard could not be accountable for the payments to Howard and Gim Chuan who are not parties in the recovery action. Richard did not receive any unusual amounts. All dispositions were gifts. Any circumstantial evidence must be consistent with undue influence. The burden of setting aside the gifts rest with the parties who alleged otherwise. E

Notwithstanding a dominant position, it must be established that that person used his position to obtain an unfair advantage. Dominion and use of that domination must be proved. The relationship of father and son is not a relationship of active confidence. Without proof of actual undue influence or a relationship of active confidence, the plaintiffs must fail in the recovery action. Undue influence must be judged against the actual state of mind of the deceased. The conversations with the doctors disproved senility. The evidence on senility was inconsistent with the indisputable evidence. Reliance on the 24 July 1992 deed was inconsistent with senility. In June 1992, the deceased spoke to Nik Saghir. The deceased could not be senile. Say Bee testified that the deceased spoke to him in April 1992. In June/July 1992, Hamid advised the deceased not to redeem the Teluk Bahang land. The deceased said he had no monies to pay his sons. He asked Hamid to convey his message to Cheng Bok and Cheng Liat. In July 1992, Hamid was with the deceased in Kuala Lumpur. Hamid did not say that the deceased was senile. In November 1992, the deceased signed the proposed development plans. All that refuted senility. F G H

After the death of his wife, the deceased was more liberal with money. The deceased was fair but he had a right to give unequally to his children. If the deceased was of a sound disposing mind, then the rationale for his I

A acts need not be established. The law would not question his gifts, even though capricious. The deceased might have been less than logical, but he was not unsound. There was no evidence, actual or presumed, of any undue influence in any of the gifts. If the deceased was not senile on 3 August 1992, the transfer of the Teluk Bahang land was good. The B reasons offered by the donees for the gifts were not relevant. The reasons could be an excuse to ask for the money. The excuse might have been disbelieved but the deceased made the gifts nonetheless.

A gift per se is no ground to infer undue influence. The case was one of senility and not undue influence. The gift must be so large or the transaction so improvident as not to be reasonably accounted for on the C ground of friendship, relationship or ordinary motives. There was no evidence of an improvident or large gift. There must be evidence of a relationship under which the deceased generally repose trust and confidence in the first to third defendants. There was no real evidence and the plaintiffs resorted to wild allegations. There being no case of fraud, senility D or undue influence, Cheng Poon needed not answer to the accusations. The plaintiffs reported to the police that the deceased was senile from January 1992. However, they changed their mind and further alleged fraud and undue influence. Their change of mind was against the bona fides of their cause. The charge of undue influence and fraud was trumped up.

E On the failure of Cheng Poon to give his version, Mr Koh tendered the case of *Mcqueen v Great Western Railway Co* (1875) QBD 569. He said that an adverse inference should not be drawn against Cheng Poon for not testifying as that inference would be against the evidence in general.

Mr Foo Say Keow

F

Supplementing Mr Koh's submission, Mr Foo submitted on: (i) fraud and the execution of the 1992 wills, (ii) the credibility of Howard, and, (iii) the US estate.

On fraud, he said, there were three periods to be considered: (a) 1989, G (b) 1 August 1992 to 3 August 92, (c) 3 August 1992 to 14 September 1992.

There was no truth that Cheng Poon forged the 1989 deed. The deceased instructed the 1989 deed. It was not proved that Cheng Poon instructed its preparation. The deceased insisted on cl 5 and the deceased had knowledge of Cheng Poon's request for sole use. There was no proof H of the true intent of the 1989 deed or the 'wrong information' given by Cheng Poon. The deceased being acquainted with wills knew that the 1989 deed was a trust deed. The deceased's properties were more than the five listed in the 1989 deed; therefore, by the 1989 deed, Cheng Poon could not 'swallow' the whole estate. There was nothing wrong in Cheng I Poon's request for sole use. Each son desired their father's property. 'It was up to the father.'

To prove fraud in the making of the 1989 deed, the plaintiffs relied on 'circumstantial' facts. It must be asked if those 'circumstantial facts', if

proved, were sufficient evidential material to infer fraud. It was a vile attempt to relate the 1990 codicil to the 1989 deed. If Cheng Poon cheated, why was Cheng Poon not punished but appointed the governing trustee, Mr Foo asked. 'There was nothing wrong with the 1989 deed, and there should not be any suspicion of wrongdoing by Cheng Poon.' The deceased could have consulted Nik Saghir, Lim and Hamid because he was not clear as on the effect of cl 5.

Cheng Bok testified that he discussed the 1989 deed in Singapore. Yet Cheng Bok testified that he was not aware of the 1989 deed until after the death of his father. On the 1990 codicil, there were discrepancies between the evidence of Hamid and Nik Saghir. The plaintiffs willfully presented a false case. Mr Foo further commented that the plaintiffs' stand on Lim was ambivalent; cast as a villain in the 1992 wills, Lim was allegedly deceived in the 1989 deed.

'The difficulty with the 1992 wills is which wills were executed.' There was no fraud in the preparation of the 1992 wills. Beng Tatt's evidence that he had the sole key to the safe was incredible. If the deceased was not senile, then Beng Tatt's testimony that the deceased was senile would be totally discredited.

Howard testified that the deceased gave him amended copies of the 1990 wills. Beng Tatt's version was that Howard took the 1990 wills from the safe. However, the evidence showed the desire of the deceased to change his wills. To change his wills, the deceased must have the 1990 wills; there was no need for Howard to force open the safe. Howard's version that the deceased handed him the amended 1990 wills was consistent with the desire of the deceased to change his wills.

Howard testified that he prepared the 1992 wills on 2 August 1992 — a Sunday. Beng Tatt testified, most conveniently, that he saw Patricia Lim on 3 August 1992 — a Monday — as Beng Tatt would not have witnessed what he said he saw on a Sunday. Patricia Lim should have been called by the plaintiffs. 'If there was fraud in the preparation of the 1992 wills, why would the 1990 wills be left so easily for Cheng Bok to retrieve from the deceased's room?' 'If the deceased was not senile, then everything that occurred on 3 August 1992 occurred as the deceased wanted it so.

On 3 August 1992, the deceased was not senile; he would have rejected the 1992 wills if they were 'Howard's wills' and not his wills. On the contrary, by executing the 1992 wills, the deceased showed that he knew and approved of the 1992 wills.

Hamid's testimony that he handed a copy of the 1990 wills to Pykett Avenue could not be believed. It was an after thought to support the allegation of fraud. If Cheng Poon, Richard or Howard had forced their intention on the deceased, they would have been exposed to Dr Tan and Dr Gafoor. What took place on 3 August 1992 showed that the deceased approved of the events of 1 August 1992 to 3 August 1992. 'Otherwise, there could not have the conclusion — the 1992 wills.'

On 3 August 1992, the deceased signed the 1992 wills in the presence of two witnesses. Lim's testimony, though faulted on the second 1992

Thai will, should not be rejected out of hand. The second 1992 Thai will did not affect the integrity of the 1992 wills. Dr Gafoor might have been an honest witness, but his recollection was defective and his evidence was influenced perhaps unwittingly by the allegation of fraud. Dr Gafoor admitted he was not curious. Therefore, he was not an observant witness — he was wrong on Richard and he did not see Howard.

The senility of the deceased was a false case. Beng Tatt lied that the deceased was senile. His evidence must be scrutinised for its consistency with the senility of the deceased.

Mr Foo conceded, 'we have difficulty with Lim Cheng Chuan, whether he was a credible witness'. The fact that both witnesses to the 1992 wills were not reliable should not affect the validity of the 1992 wills if other evidence pointed to the 1992 wills as the last will of the deceased.

On Howard's credibility, Mr Foo submitted that his credibility should be evaluated after a consideration of all evidence. 'Poor demeanour should detract from the truth of the evidence,' he said.

On the US estate, Howard appointed Douglas Newman as his attorney to conduct the affairs of the estate in Arizona. Le Beau was the attorney at law for Howard as trustee. Howard presented the petition to preserve the US assets — see DB1(F)(30). Newman was not Howard's alter ego — 'Newman was Howard's nothing'. Newman was the Special Administrator of the US estate. Even without Howard's consent, the US courts could appoint Newman. Newman was not acting under Howard's directions. Newman was interested in the estate as a creditor — for fees due to him from the estate.

On the allegation that Howard sold the US assets to lay his hands on the money, the accounts — D37 — answered it comprehensively. The sale of the Benson land was sanctioned by the US courts. Howard did evade the issue of the RM225,000. Even though Howard might have been evasive, his evidence was borne out by other evidence. Howard denied that he wanted to ensure his position as a trustee. His denial was consistent with the desire of the deceased to appoint Howard as a trustee. Howard left on 5 August 1997. He did not know of the second Thai will. Who prepared the second 1992 Thai wills is still a mystery. It would appear that the deceased or Lim prepared the second Thai will. Either way, it would not affect the first to third defendants. 'Howard's demeanor might not be good but he was telling the truth.'

Cheng Poon did not answer his accusers as their accusations were not proved. There was no need for Cheng Poon to answer to the 'gifts, transfers and other payments'. The deceased was winding up his earthly affairs.

Mr Yeoh Aik Jin

Mr Yeoh's submission, with regard to the 1990 wills (his submission on the 1992 wills could be gathered from the transcript of the proceedings), may be summarised as follows:

Both the 1990 and 1992 wills were not valid wills. There was no burden on Cheng Hum or Grace to prove that the wills (1990 or 1992) were invalid. Where unsoundness of mind is alleged, the burden of proof rests upon those who set up the will. The burden of proving undue influence or fraud is on the party who alleges it.

The deceased was not of good health or memory and had a poor understanding of his wills when he executed the 1990 wills. In 1990, the deceased, who was 85, suffering from poor health, memory loss and senile dementia aggravated by the loss of his wife, could not have had the mental capacity to execute the 1990 wills. The deceased's health had never been good. He suffered from assorted ailments. He was on heavy medication. In July 1992, the deceased suffered a series of seizures stemming from a mild stroke. His medical condition reflected his advanced age and the degenerative process. His mental state was as bad as his bodily state.

As early as October 1987, the deceased was under Dr Tan's psychiatric care. There were periods in 1987 when the deceased was disorientated and in a confused state. According to Dr Tan, for a year prior to 1987, the deceased had been taking too much medication. Dr Francis Tan explained the effect of prolonged use of sedatives. The conclusion to be drawn is that prolonged use of sleeping pills would give rise to anxiety, confusion, hallucinations, memory loss and mental, given the age of the deceased. The lacuna infarct, progressive intellectual loss, age and the medication over the years must have reduced the mental capacity of the deceased to the extent that the 1990 wills were not wills of the deceased.

Whether the deceased had the mental capacity must be answered. The burden on the plaintiffs to prove that the deceased had the capacity to make the 1990 wills had not been discharged. The deceased and his wife were inseparable. Her passing and the effect on the mental capacity of the deceased could not be dismissed.

Dr Tan's certificates did not settle the controversy on the testamentary capacity of the deceased when he executed the 1990 wills. Those certificates, in the absence of supporting clinical findings, were bare certificates. Dr Tan did not display the skill of an ordinary competent psychiatrist. The alleged conversations between the deceased and Dr Tan must be doubted. Interested parties accompanied the deceased on each of those visits and conveyed to the doctor the information attributed to the deceased and or to prompt the deceased. 'Not one of those five visits were serious sessions — more social chit-chat. Those visits were not professional visits.'

Dr Tan said that the deceased wanted a penile prosthesis. How could the deceased, a disciplined no-nonsense person who cared for his image, have asked for a penile prosthesis? If he did, then he was out of his mind. The doctor testified that the deceased, on 24 October 1990, expressed his unhappiness over Cheng Liat. Cheng Liat testified that Cheng Poon planted it into the deceased's mind. Therefore, Cheng Poon could have conveyed the information recorded by Dr Tan on 24 October 1990. On 24 July 1992, the deceased was himself assailed with all sorts of ailments and could not have discussed the new drug, Laponex. Cheng Poon gave

A the consent for Laponex to be administered to Cheng Been and Cheng Poon would have had those conversations with the doctor. The following minutes were found in the clinical notes for the visit on 24 October 1990: 'Patient's will in Penang (Malaysia) Thailand and USA will all be altered accordingly'. However, in October 1990, the deceased was yet not having separate wills for his overseas properties and could not have told the B doctor of separate wills.

It must be asked if those certificates were orchestrated by those who would profit from those certificates and ensuing wills. Was this a case of making as many wills as possible and saving the best for last, as the situation demands? Those certificates could safely be disregarded — Dr Tan C admitted that the mental condition of the deceased could fluctuate even on the day of the certificate. Because of the poor examination and poor records, the court should not and could not rely on Dr Tan's certificates, and also as the doctor himself was non-committal — he said the deceased's mental condition out of his office could be unpredictable. Senile dementia D could be seen from: (i) the deceased had no recollection of the 1989 deed, and, (ii) Cheng Hum was ordered out of the house because Cheng Hum refused to sell the balance Ayer Itam lands. The doctor's evidence must be scrutinised critically.

In the case of an old and infirmed testator, it is necessary for a doctor to be present and for that doctor to be satisfied as to the testamentary E capacity of the testator.

Undue influence fitted in with the state of health of the deceased. Undue influence was constituted by: (i) Cheng Poon's influence, (ii) Hamid Merican's influence, and (iii) first and second plaintiffs's influence. The deceased's trust in Hamid and Cheng Poon's influence were the principal F reasons for the 1990 wills. The 1990 wills were procured by the importunity of Cheng Poon and Hamid. The role of Cheng Bok and Cheng Liat were limited to the meetings in Singapore. After the death of Ooi Geen Peen, the deceased felled prey to Cheng Poon's manipulations. Cheng Hum was the favourite son. Cheng Poon was given more because of his manipulations.

G The influence of Hamid and Cheng Poon were complementary. Cheng Poon worked his way into a position of influence with his parents even before the death of Ooi Geen Peen. Cheng Poon was running Cheng Hum down. Cheng Poon postured himself as the better son and got to strengthen his influence over the deceased.

H Cheng Poon's influence, as late as 1987, was kept at bay; the provisions of the 1987 will essentially reflected the provisions of the 1986 will. In the 1987 will, the deceased directed his trustees to ban Bok Eng from Pykett Avenue. However, that provision and the financial provisions for Cheng Hum and Grace were not found in the 1989 will. That was Cheng Poon's doing and influence. In the absence of Cheng Poon from the witness I stand, all adverse inferences must be drawn against Cheng Poon.

Cheng Poon could get the deceased to sign the 1989 deed even without the deceased knowing the contents of the 1989 deed. Cheng Liat had to wait for Cheng Poon to be away before he could speak to the deceased about the

1989 deed. The deceased signed the 1989 deed without knowing the nature and effect of the 1989 deed. If indeed the deceased had instructed the 1989 deed, then how could he have been shocked by the provisions of the 1989 deed? Why would the deceased asked for a second opinion, and why would the deceased want to terminate a deed he instructed? If indeed the deceased instructed the 1989 deed, then it was inconsistent with his anger at Cheng Poon. Therefore, the deceased could not have instructed the 1989 deed. The deceased did not and could not have instructed Lim on any of the deeds/documents that Lim prepared. The 1989 deed was someone else's deed. If the 1989 deed was the deed of the deceased, then the deceased's memory in 1989 had deteriorated as he could not even remember his own deed made just about within the year before.

The two trips to Singapore in 1989 were not holiday trips. It was the stage for the three brothers to come to their agreement to share the estate. Since the deceased was not aware of his sons' arguments or quarrels, then those two trips to Singapore were not arranged by the deceased. Hamid initiated all meetings in Singapore. Hamid was a monetary opportunist. Otherwise why would Hamid give evidence partial to three sons. The trip to Nik Saghir's office was also planned by Hamid. It was a follow up to the trips to Singapore. The meeting at Nik Saghir's office was not to seek legal advise on the 1989 deed but to get the deceased to sign a will reflecting the agreement of the three sons reached in Singapore. Everything about the 1989 codicil was unclear. The state of mind of the deceased and his intention in March 1989 could not be known.

Cheng Poon could direct the deceased to force Cheng Hum to sell the Bukit Tengah lands. That was the extent of Cheng Poon's influence. Cheng Bok, Cheng Hum and Cheng Liat all agreed that Cheng Poon had a menacing influence over the deceased. Cheng Hum and Cheng Liat's ejection from Pykett was all due to Cheng Poon's doing.

'In 1989, if the deceased intended a will, did he get to do it or had events simply overtaken him. There was no will after all the meetings in Singapore and Kuala Lumpur. It would appear that the deceased was taken for a ride.' The will was signed in October 1990. 'Why was there that delay? Were the brothers waiting for the right moment to strike — to obtain a will in their favour?' 'The circumstances leading to the 1990 wills was a void. Unlike the 1990 codicil, the 1990 wills were born rather quietly. The 1990 wills was the product of an uneasy and unholy alliance that Hamid concluded.' The 1990 wills were procured by the importunity of Hamid, whether jointly or severally with Cheng Poon, Cheng Liat and Cheng Bok.

Given the suspicious circumstances, there must be strong proof of the intention to execute the 1990 wills. There was undue influence in the making of the 1990 wills. The deceased did not know nor approved of the 1990 wills. The plaintiffs failed to prove the mental capacity of the deceased, and if they did, then they failed to prove that the deceased knew and approved of the contents of the 1990 wills.

A The deceased could not know and could not have approved of the 1990 will: (1) Ghazi Ishak did not prepare the 1990 wills, (2) the deceased did not personally instruct Ghazi Ishak to prepare the 1990 wills, (3) Ghazi Ishak did not explain the 1990 wills to the deceased, (4) the deceased did not question nor discuss the provisions of the 1990 wills, (5) Ghazi Ishak did not say whether the deceased was reading silently or loudly, and B (6) Ghazi Ishak assumed that the deceased must have read the 1990 wills.

Ghazi Ishak's testimony fell short of saying that the deceased understood the provisions of the 1990 wills. His impression was based on his previous dealings. Given the medical history of the deceased, mere reading is not enough. There was sufficient suspicious circumstances rebutting a C presumption of knowledge of the contents of the will by mere execution. Why did Hamid testify that Ghazi Ishak read and explained the 1990 wills to the deceased when it was not true? Ghazi Ishak testified that he only saw the deceased on 24 October 1990, but Hamid said that the deceased gave his instruction to Ghazi at Ghazi's office prior to 24 October 1992. There D were material differences in the testimony of Hamid and Ghazi Ishak with regard to the preparation of the 1990 wills.

The deceased who was careful and meticulous required all things to be properly done. The following should be asked: (1) what were the instructions given, if at all, to Hamid, (2) why was it necessary for the deceased to instruct the preparation of 1990 wills, some seven months after the execution E of the 1990 codicil, (3) why did the deceased instruct a property broker and not a lawyer to prepare the 1990 wills, (4) why was the civil engineer who assisted in the preparation of the 1990 wills not called, (5) why would the deceased go through the trouble of getting medical certificates and then had his wills prepared by lay persons without the assistance of F lawyers, and (6) why would the deceased, a careful and meticulous man, had no questions to ask Ghazi Ishak but proceeded meekly to execute his 1990 wills.

The 1990 wills were made in pursuance of the three sons' agreement in Singapore, an agreement without the knowledge or consent of the G deceased. Since the deceased was not aware of the three sons' agreement, at which point of time was the deceased informed that the 1990 wills were in accord with the three sons' agreement in Singapore? Ghazi Ishak's testimony that he did not read, prepared, discussed nor explained the 1990 wills to the deceased showed that the deceased did and could not have known of the provisions of the 1990 wills. No evidence was led to H show that the deceased intended the 1990 wills. Evidence must be led that the deceased knew he was executing three wills. There could not be any presumption that the deceased knew he was signing three wills merely because his signature appeared on three wills.

Inquiries touching the validity of a testamentary disposition are matters I touching the conscience of the court. In the absence of evidence of the intention of the deceased, and in the light of the three sons agreement in Singapore, it would appear that the 1990 wills were the wills of the three sons.

There were circumstances arousing suspicion: (i) the 1990 wills reflected the three sons' agreement, (ii) on 24 October 1990, Cheng Poon was with the deceased at Dr Tan's clinic, and (iii) clinical notes that the deceased's wills in Penang, Thailand and USA will be amended accordingly. A

Although Hamid was not a beneficiary under the 1990 wills, the onus was on him to substantiate the truth and honesty of the transaction, bearing in mind that he was in Singapore when the brothers reached their agreement and he was also instrumental in framing the 1990 wills. The three 1990 wills was a radical departure from the previous practice of only one will. This departure must be examined. B

Allegedly, Cheng Hum was bypassed because Cheng Hum had inherited properties. The deceased could not have said so. The deceased enjoyed a close relationship with Cheng Hum until the dispute in 1990. The deceased could not have provided a paltry RM20,000 to Cheng Hum. It was Hamid's doing in pursuance of the agreement between the three sons. Why would Hamid prepare the 1990 wills? There must be something for him. Hamid had been able to move with the tide, and always harvested where it was bountiful. C D

Hamid gave a loan of RM500,000 for the purchase of a Rolls Royce. That evidence was fabricated. Then he said he was not personally aware if his loan of RM500,000 was used to purchase the Rolls Royce. Cheng Poon paid the RM512,000 cheque to Hamid, and Hamid received that cheque in their grand scheme to dissipate the monies of the deceased. Hamid was in the thick of things concerning the three sons. Hamid must be cautiously received. His credibility is in doubt. He was a shark as much as the first to third defendants. E

The deceased could not have told Cheng Bok of the 1990 wills. Everything said in court about the 1990 wills being the wills of the deceased could not have happened. Cheng Liat denied that Cheng Poon and Hamid influenced the deceased in signing the 1990 wills. That denial was baseless — the agreement in Singapore and the meetings at Nik Saghir's office and at E & O Hotel. Cheng Poon must have known of the 1990 wills — Cheng Poon was at the clinic on 24 October 1990. The denial was inconsistent with the known facts and also inconsistent with his allegation that Cheng Poon and his sons were instrumental in procuring the 1989 deed and the 1992 wills. F G

Cheng Hum as first born held the place of pride in the family. He was deserving of a rightful share of his father's properties. Yet under the 1990 wills, Cheng Hum got less than his nephews and nieces. He got nothing near that of his lessers. Cheng Hum displayed no malice to his brothers. There was only truth in his evidence, recounting his entanglements with the deceased and over the sale of his share of the Ayer Itam land and the Bukit Tengah land, no doubt instigated by Cheng Poon. Things fall apart when the centre — Ooi Geen Peen — could not hold. The deceased fell victim to his children. When things were falling apart, the only son who seemed to be riding the crest was Cheng Poon. H I

None of the 1986, 1987, 1989 wills designated a governing trustee. The 1990 wills designated Cheng Poon as governing trustee. It showed that Cheng Poon's influence had matured. In the 1990 Thai will, Cheng Poon got an extra 10% for being faithful and filial. Why was Cheng Poon given that extra 10% must be asked. Why was Cheng Poon described as faithful and designated governing trustee must also be asked and explained. Cheng Liat testified that he called Cheng Poon a wicked son. Yet within a year, the deceased called Cheng Poon a faithful son. Cheng Poon inserted the provisions into the 1990 wills.

The fact that Cheng Liat and Cheng Bok profited equally from Cheng Poon's fraud documents did not detract from the fraud of Cheng Poon. Cheng Poon was found out on the 1989 deed. He had to tread cautiously. He was therefore even handed to Cheng Bok and Cheng Liat. But Cheng Poon had his eye on the deceased's bounty. The three sons discarded Cheng Hum but on the evidence the deceased could not have done so.

Howard said the deceased did not want the 1990 will (see 420N). On the basis that the 1990 will had not complied with the formal requirements, then the deceased would have no wills. The deceased's declaration was a sufficient revocation of the 1990 wills.

With or without the collaboration of the first and second plaintiff, the first defendant had so prejudiced the mind of the deceased against Cheng Hum, that Cheng Hum who had by any other account was a natural object of the deceased's bounty or affection, was excluded.

It was the fraud of the first defendant that forced out the fourth defendant from the house and from intercourse with his father. It is the fraud of the first and second plaintiffs as well with Hamid's assistance to realise for themselves an equal distribution of the deceased's property in pursuance of their agreement in Singapore to the exclusion of Cheng Hum. Cheng Poon had remained silent. He was the central player and all allegations against him remained unrebutted. These allegations are serious allegations, and yet they remained unanswered. They cannot better their evidence by not calling evidence. That would be a dangerous precedent for those with unclean hands.

The court must find intestacy, if it finds that the 1990 and 1992 had not been proved.

Mr Khoo Boo Lai and other counsel

Mr Khoo delivered the main submission for all the plaintiffs; his submission as well as that of other counsel and the respective replies could be garnered from the transcript of the proceedings.

The peadings and the evidence, and hearsay

A tonne of 'evidence' was adduced in the (instant) trial. However, not all could be considered. A fair and just determination of the issues and a

correct judgment require proper evidence and there can only be proper evidence if the issues were clear in the minds of the parties and of the court and evidence was adduced and admitted accordingly [see *Saraswatee d/o Arumugan & Anor v Tan Chong & Motors Co Sdn Bhd* [1985] 1 MLJ 327]. A

Pleadings serve to give fair notice of the case which has to be met, so an opponent would not be taken by surprise [*Spedding v Fitzpatrick* (1888) 38 Ch D 414], and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties (36 *Halsbury's Laws of England* (4th Ed) para 4). Matters which if not expressly stated might take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings must be specifically pleaded [O 10 r 8(1) of the Rules of High Court 1980]. No evidence of such matters can, as a rule, be given at the trial if they were not expressly pleaded (English *Supreme Court Practice 1995* para 18/8/2), for 'to condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded [*Esso Petroleum Co Ltd v Southport Corp* [1955] 3 All ER 864 at p 869, per Lord Normand]. B C D

'[A] case must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment' (per Buttrose J in *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] MLJ 99 at p 101). If a case was decided on an issue not raised in the pleadings, then, 'the judgment must be set aside': *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 at p 159 [see also *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22]. A party who at the trial radically departs from his case as pleaded is likely to fail: *Waghorn v George Wimpey & Co Ltd* [1970] 1 All ER 474. And so in *Amos William Dawe v Development & Commercial Bank (Ltd) Bhd* [1981] 1 MLJ 230, where the appellant had not sought to amend his defence, the Federal Court held that the appellant's affidavit which raised issues of fact not averred to in the pleadings but which also flatly contradicted his own pleadings could not be considered. E F

There was also evidence — out of court statements — that could not be relied on testimonially as proof of the facts asserted. Where oral evidence is adduced, s 60(1) of the Evidence Act 1950, the codification of the common law hearsay rule, requires that it shall be direct: G

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact; H

(c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which the opinion is held, it must be the evidence of the person who holds the opinion on those grounds. I

Still, '[e]vidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made': *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at p 970. '... A question of hearsay only arises when the words spoken are relied on "testimonially", ie as establishing some fact narrated by the words': *Leith McDonald Ratten v The Queen* [1972] AC 378, per Lord Wilberforce at p 387. Why a statement is introduced is the deciding factor. It is hearsay if it is proposed to admit an out-of-court assertion as truth of the facts but not when it is to prove the fact that the statement was made. Indeed, illustrations (b) and (c) on the meaning of 'fact' (see s 3 of the Evidence Act) designate both spoken words and that heard as facts, and a witness testifying on spoken words (a fact) he heard, would be giving direct evidence of the words spoken although not of the facts asserted.

Presumption arising from a party not going into the witness box

Cheng Bok, Cheng Liat and Cheng Hum leveled distinct charges against Cheng Poon from the witness-box and led evidence in support. They called witnesses who testified on numerous facts in dispute (paraphrased hereinbefore) which Cheng Poon had knowledge of the whole circumstances to give evidence to contradict or to deny. But Cheng Poon did not give evidence nor subject himself to cross-examination, although he heard, since he was in court throughout the trial (almost), all that was said or made out against him.

In Common Law, *omnia praesumuntur contra spoliatorem*, all things are presumed against a wrongdoer. Therefore, in a civil proceeding, 'if a man by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted' [1 Smith LC (13th Ed) p 404]. Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him [*A-G v Windsor* 24 Beav 679 at p 706].

That maxim has been codified; s 114(g) of the Evidence Act 1950 provides that the court may presume 'that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it'. An adverse inference may be drawn if reason for the absence of important material witnesses is not given [*Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991]1 MLJ 33]. However, a presumption under s 114 is not mandatory but discretionary [*Synn Lee & Co Ltd v Bank of China* [1962] MLJ 395]. 'An adverse inference can only be drawn if there is withholding or suppression of material facts and not merely on account of failure to obtain evidence' [*Munusamy v PP* [1987] 1 MLJ 492, per Mohd Azmi SCJ]. But even then, '(a) presumption may be adopted if consistent with the proved facts' [*CEC v Comptroller of Income Tax* [1971] 2 MLJ 43, per Winslow J]. His Lordship explained (at p 58):

> In the case under reference [*Ramoo v Gan Soo Swee & Anor* [1971] 1 MLJ 235 (PC)], two police officers saw the lights changing quickly. It was accordingly incumbent upon the defendant taxi driver to deny this state of affairs. He did not give this evidence and accordingly there was no denial. The presumption was accordingly drawn because it was consistent with the proved facts. Now had the plaintiff given no evidence that the lights were green as the taxi approached the junction, and had the police officers not given any evidence as to the changing lights, it would seem that the failure of the defendant to give evidence would have justified no such presumption because the evidence on this point would have been nil on both sides.
>
> This is very far from being the case in the current appeal before me in the sense that a number of witnesses have in fact given evidence that the properties were owned by the two sons. If it was the comptroller's contention that the properties were not in fact owned by the two sons, he should have led some evidence as to this so as to create a conflict of evidence or to rebut the appellant's case. The clear documentary evidence coupled with the evidence of the solicitors concerned — matters which the board never mentioned once in the course of its lengthy judgment — makes it clear that the properties were owned by the two sons. The appellant never owned the properties at all.

With regard to the presumption arising from a party not going into the witness box and the presumption arising from not calling witnesses acquainted with facts and keeping the adversary out of possession of evidence, *Sarkar on Evidence* (4th Ed) pp 1547–1548 provides the following exposition on s 114(g) of the Indian Evidence Act, which is in pari materia with the Malaysian provision:

> Presumptions are necessarily made against parties who having a knowledge of the facts in dispute will not subject themselves to examination, when a prima facie case is made against them, and when by their own evidence, they might have answered it [*Nawab Syed v Amanee* 19 WR 149 PC at pp 150–151 ... Under such circumstances, it is impossible to overlook the significance attaching to the refusal of the respondents and their son Jot Singh to enter the witness-box. It raises a presumption against them [*Durga v Mathura* 15 CWN 717, 721–722; 10 IC 963 PC]

It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case [*Gurbakhsh v Gurdial* 1927 PC 230; 32 CWN 119]. (In this case, the question was whether a woman had given birth to a posthumous son to inherit her husband's property. She avoided a challenge to undergo medical examination on her husband's death to find out advanced pregnancy and disappeared into a foreign State whence she emerged after a long time with a male child. She was present in court during the progress of the suit but did not go to the witness box). A prima facie case is made out when the plaintiff makes a distinct charge against the defendant from the witness-box and leads evidence in support. The fact that the defendant does not come himself nor calls any witness to contradict the evidence shows that the facts alleged cannot be denied. What was prima facie against the defendant becomes conclusive by failure to deny [*Pranballav v Tulsibala* (1958) Cal 713; 63 CWN 258].

A Everything is to be presumed against a party who keeps his adversary out of the possession of evidence by taking means of retaining the evidence in his own custody. A similar presumption may also arise when a party does not call witnesses who are within his reach and are acquainted with the facts of the case [*Thulai v SA* 1973 SC 501; *Virendra v Jagiwan* 1974 SC 1957; *Sooriah v Cotaghery* 2 MIA 113, 125; *U Po v Edward* 1934 Rang B 139; *Trailakhya v Kenaram* 61 CLJ 551]. When a party failed to call as his witness the principal person involved and who was in a position to give first hand account of the matter in controversy and who could have refuted on oath the allegation on the other side, it is legitimate to draw an adverse inference. The court may draw adverse inference against a party who being C in a better position to adduce better evidence deliberately abstain from doing so. Persons omitting to produce their best available evidence cannot take advantage of the abstract doctrine of onus of proof [*Md Hussain v Secretary of State* AIR 1939 Lah 330].

In the adversarial system of trials, a litigant has the absolute right to D conduct his case as he sees fit. Nevertheless, for Cheng Poon, Richard and Howard, the failure of Cheng Poon to testify or offer himself for cross-examination, which was not a valuable contribution to their cause, would be a recurring theme when considering the evidence.

The law relating to wills

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The following survey on the law relating to wills [and much was extracted from Chapter 13 of Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate*; Chapter 33 of Tristram and Coote's *Probate Practice* (28th Ed) and Vols 17 and 50 of the *Halsbury's Laws of England* F (4th Ed)] should find room in this grounds.

A 'will' means 'a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the G guardianship, custody and tuition of any child' (s 2 of the Wills Act 1959).

Other than privileged wills, the requisites for the formal validity of a will are: (i) it must be in writing, (ii) it must be signed 'by the testator or by some other person in his presence and by his direction, and, (iii) such signature shall be made or acknowledged by the testator as the signature H to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator' (s 5 of the Wills Act 1959).

The requisite for the substantial as distinct from the formal validity of a will is that the testator's mind must go with his testamentary act. It is I necessary for the validity of a will that the testator should be of sound mind, memory and understanding — words which have consistently been held to mean sound disposing mind. It is essential that the testator should know and approve of its contents. [*Hastilow v Stobie* (1865) LR 1 P & D 64; *Guardhouse v Blackburn* (1866) LR 1 P & D 109]. Unless suspicion

attaches to the document, the testator's execution is sufficient evidence of his knowledge and approval [*Guardhouse v Blackburn*]. Unless there is a question of fraud, the fact that a will has been read over to or by a capable testator, or the contents brought to his knowledge in some other way, is as a rule conclusive evidence that he knew and approved of the contents [*Guardhouse Blackburn*; *Atter v Atkinson* (1869) LR 1 P & D 665 at p 670]. That latter presumption may be rebutted [*Garnett-Botfield v Garnett-Botfield* [1901] P 335] but only by the clearest of evidence [*Gregson v Taylor & Ors* [1917] P 256]. If knowledge and approval are clearly established at the time of giving instructions for a will, or drafting it, very little evidence of the position at the time of execution is required [*Re Wallace & Ors, Solicitor of the Duchy of Cornwall v Batten* [1952] 2 TLR 925].

A B C

There are a number of ways in which a testator's mind may not go with his testamentary act. He may lack, or be deemed to lack testamentary capacity; he may not know and approve of the contents of the will; he may be deceived into making it by fraud or constrained to make it by force, threats or other forms of undue influence. Another person may forge a will and propound it as that of the deceased. Wherever any of the above matters are proved, the document purporting to be executed by the deceased has no validity and cannot be admitted to probate (Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate* at p 158).

D

In *Banks v Goodfellow* (1870) LR 5 QB 549, Cockburn CJ said:

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> It is essential ... that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and there shall with a view to the latter object, be no disorder of the mind that shall poison his affection, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if his mind had been sound, would not have been made.

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'The law does not call for a perfectly balanced mind, nor is a will to be pronounced against merely because the testator was moved by capricious, frivolous or even bad motives. A testator may disinherit his children to gratify his spite or benefit charity to gratify his pride but the court must nevertheless uphold his will' (Mortimer, Williams and Sunnuck at p 159).

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'In broad terms it may be said that there are two grounds on which a person may be held to lack testamentary capacity: (i) that his mind has never developed sufficiently; and (ii) that his mind has become impaired, temporarily or permanently ... There are two groups of causes of mental impairment. (1) Organic (physical) causes which impair the operation of the brain, (2) Functional disorders, ie mental illness without established physical causes ... faculties principally affected by organic causes are consciousness, memory, attention, concentration, calculation and the ability to appreciate the significance of events and recall them ... functional disorders refer to morbid changes in mood or of thinking ... The most common causes of testamentary incapacity are; (i) physical injury, (ii) physical illness, (iii) abuse of alcohol or drugs, (iv) dementia, and,

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(v) functional mental illness, eg Schizophrenia' (Mortimer, Williams and Sunnuck at pp 161 to 166).

Halsbury's Laws of England (4th Ed) Vol 17 para 898 thus enunciated a sound disposing mind:

> In order to be of sound disposing mind, a testator must not only be able to understand that he is by his will giving his property to one or more objects of his regard, but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding from participation in that property ... It is essential that no disorder of the mind should poison his affections, pervert his sense of right or prevent the exercise of his natural faculties, that no delusion should influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

The degree of capacity which must be retained by the old was discussed in *Den v Vancleve* 2 Southard at p 660:

> By the terms 'a sound disposing mind and memory', it has not been understood that the testator must possess these qualities of mind in the highest degree; otherwise, very few would make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done, for even this would disable most men in the decline of life; the mind may be in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge, of all things and all those circumstances which enter into the nature of rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound disposing mind and memory.

'One of the most difficult features where wills made by old people are in question is their varying state of mental capacity. At some time, they may be confused while, at others, they are completely lucid. Fluctuant confusion of this nature is particularly characteristic of dementia caused by arterial blockage ... Evidence which conclusively shows that within a few days of his testamentary act a person was quite incapable of making a will does not necessarily prove that he was incapable at the time he actually made it. For this reason, the evidence of those present when the deceased gave instructions for his will or at its execution (if they were not merely witnesses called into his presence for a few moments) is of considerable weight. This is particularly so where such persons were unprejudiced and where the court is satisfied that they took pains to assess the mental state of the deceased and where they give evidence of facts and matters which support their assessment. In many cases, the evidence of such lay witnesses has been preferred to medical evidence ... It has been said that when a solicitor is drawing up a will for an aged testator or one who has been seriously ill, it should be witnessed or approved by a medical practitioner who ought then to record his examination (and findings) [see *Re Simpson, the deceased; Schaniel v Simpson* (1977) 121 SJ 224]. Other precautions are that if there was an earlier will it should be examined and any proposed alterations should be discussed with the testator ... It is recognized that a person who,

in general, has lost testamentary capacity by reason of mental illness may have what is termed 'lucid intervals', when the mind has returned temporarily to a sufficiently balanced state ... Once it has been proved or admitted that a testator has, in general, lost testamentary capacity through mental illness at a date before the purported will, the burden of proving that it was executed during a lucid interval lies on those who so allege ...' (Mortimer, Williams and Sunnuck, pp 164–167).

The question to be determined in probate cases is seldom what form of mental illness afflicts the testator, but whether its degree is such as to remove testamentary capacity.

In *Mudway v Croft* (1843) 3 Curt 671 at p 676, Sir HJ Fust said:

> ... it has frequently been attempted to furnish some general rules which might serve as guides to court of law in the investigation and decision of cases of (alleged unsoundness of mind) but all endeavours to do so have failed ... It is absolutely and essentially necessary to look to the peculiar circumstances of each individual case; and to judge from the whole character of the person whose mental capacity is the subject of enquiry, what was the state and condition of mind of that individual; not only with respect to the immediate times at which a will is executed, but at the intermediate stages of his life.

Those propounding the will must satisfy the court that the testator was of sound disposing mind [per Lord Brougham in *Waring v Waring* (1848) 6 Moo PCC 341; see also *Udham Singh v Indar Kaur* [1971] 2 MLJ 263; *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61]. Sanity is presumed until the contrary is shown: *Burrows v Burrows* (1827) 1 Hag Ecc 109. Where the will is rational on the face of it and is shown to be duly executed and no other evidence is offered, the court will pronounce for it presuming that the testator was mentally competent [*Symes v Green* (1859) 1 Sw & Tr 401; *Sutton v Sadler* (1857) 3 CBNS 87 at p 98]. Testator is entitled to be capricious or improvident [*Bird v Luckie* (1850) 8 Hare 301 at p 306] and slight evidence of mental incapacity will not disturb the presumption of mental capacity [*Sutton v Sadler*].

It has therefore been said that the burden of proving unsoundness of mind lies with those who allege it [*Dew v Clark and Clark* (1826) 2 Add 79; *Wheeler and Batsford v Alderson* (1831) 3 Hag Ecc 574). But when the whole evidence is before the court, the decision must be against the validity of the will, unless it is affirmatively established that the deceased was of sound mind when he executed it [*Symes v Green*; *Sutton v Sadler*; *Smith v Tebbitt* (1867) LR 1 P & D 354 at p 398; see *Harmes v Hinkson* (1946) 90 SJ 515 (PC)]. The burden of proof may shift from one party to another in the course of a case [*Waring v Waring* (1848) 6 Moo PC 341]. Where grave suspicion of incapacity arises in the case of those propounding the will, they must dispel that suspicion by proving testamentary capacity [Ibid at p 356]. Thus where it is admitted by those propounding the will that the deceased suffered from serious mental illness at a period before the will [*Bannatyne v Bannatyne* (1852) 2 Rob Eccl 472], or where its terms are incoherent, irrational or strange [*Austen v Graham* (1854) 8 Moo

A PCC 493], a presumption is raised against it, though not a conclusive one (Mortimer, Williams and Sunnuck at p 169).

A party who puts forward a document as being the true last will of the deceased must established that the testator knew and approved of its contents at the time when he executed it [*Barry v Butlin* (1838) 2 Moo PC
B 480; *Guardhouse v Blackburn* at p 116]. In ordinary circumstances, the burden of proof is discharged by proof of testamentary capacity and of due execution, from which knowledge and approval by the testator of the contents of his will are assumed [*Barry v Butlin* at p 484]. The burden of proving due execution is upon the person setting up the will. 'The evidence of one of the attesting witnesses, if he deposes to the due execution, is
C sufficient' [17 *Halsbury's Law of England* (4th Ed) para 892]. There is a presumption of due execution where there is a proper attestation clause, even though the witnesses have no recollection of having witnessed the will [*Woodhouse v Balfour* (1887) 13 PD 2; *Re Webb, the deceased; Smith v Johnston & Ors* [1964] 2 All ER 91], but this presumption may be rebutted
D by the witnesses [17 *Halsbury's Laws of England* (4th Ed) para 893] or otherwise [*Re Parslow, Parslow v Parslow* (1959) The Times, 3 December — evidence that the attestation was forged].

Knowledge and approval, and it takes any form provided it is strong enough to satisfy the court, must be affirmatively proved by those propounding the will if those who oppose it, by cross-examination or
E otherwise, succeed in meeting the prima facie case raised by proof of execution [*Cleare v Cleare* (1869) LR 1 P & D 655 at p 658].

Suspicion must be removed by the person propounding the will (see *George Lee Chin Nam v Lie Chin Man* [1996] 1 CLJ 82). The degree of suspicion will vary with the circumstances of the case. It may be slight and
F easily dispelled — eg by proof of a change since the earlier wills [*Constable v Tufnell* (1833) 4 Hag Ecc 465]. Though, in cases where the vigilance and suspicion of the court are aroused, the burden of proof may be so heavy that it hardly can be removed [*Wintle v Nye* [1959] 1 WLR 284].

'If a party writes or prepares a will under which he takes a benefit, that
G is a circumstance that ought generally to excite the suspicion of the court' [*Barry v Butlin*]. 'There is one rule which has been laid down by the courts ... and that is that a person who has been instrumental in the framing of a will, and who obtains a bounty by that will, is placed in a different position from ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies ... But there
H is a further onus on those who take for their own benefit, after being instrumental in preparing or obtaining a will ... the onus of showing the righteousness of the transaction' [*Fulton v Andrew* (1875) LR 7 HL 448, per Lord Hatherley]. So where a person propounds a will prepared by himself and under which he takes benefit, he must give clear proof that the
I testator knew and approved of that part under which he takes a benefit [*Hegarty v King* (1880) 5 LR Ir 249; affd 7 LR Ir 18 CA]. 'This means that, if no evidence is given by the party on whom the burden is cast, the issue must be found against him [*Barry v Butlin*], but if evidence is given

on which the court can come to a determinate conclusion the onus need not be considered. On the other hand, if the evidence is so evenly balanced that no determinate conclusion can be reached, the onus becomes the determining factor of the whole case ... It rests upon the person who has procured a will under which he takes a large benefit to show that the will does really express the testator's mind and intention [*Brown v Fisher* (1890) 63 LT 465]' [17 *Halsbury's Law of England* (4th Ed) para 915].

Where a testator gives instructions in answer to questions, particularly leading questions, the court will require more stringent proof than in other cases that the will embodies the unprompted testamentary intentions of the deceased [*Green v Skipworth* (1809) 1 Phillim 534 at p 538]. The fact that the deceased has given no instructions for the will requires explanation *Middleton v Forbes* (1787) cited in *Ingram v Wyatt* (1828) 1 Hag Ecc 384 at p 395] and so does the fact that the deceased was without independent advice, legal or otherwise, and that his relations and friends were kept from him. A radical departure from testamentary dispositions, long adhered to, requires explanation, especially if the person in whose favour the change is made possess great influence and authority with the deceased and originates and conducts the whole transaction [*Marsh v Tyrrell and Harding* (1828) 2 Hag Ecc 84 at p 87], and such facts may raise strong suspicion that the change was not the result of the free volition of the deceased [*Marsh v Tyrrell* at p 110]. A variety of other circumstances may combine to show that a person has procured a will for his own benefit. Feebleness of body or mind may not be relied on to question the righteousness of the transaction [*Re R the deceased* [1951] P 10 at p 17].

In *Re R the deceased*, Willmer J said:-

> The conclusion which I draw from these authorities [*Davis v Mayhew* [1927] P 264; *Low v Guthrie* [1909] AC 278] to which I have referred is that, when it is a question of knowledge and approval of the contents of a will the circumstances which are held to excite the suspicions of the court must be circumstances attending, or at least relevant to, the preparation and execution of the will itself.

Surrounding circumstances not attending or relevant to the preparation and execution of the will may well be relevant to other issues such as testamentary capacity or undue influence. Conduct of the beneficiaries may amount to fraud [*Fulton v Andrew* at p 448]; but the court must not address itself solely on the question of fraud and decide the case on whether or not those opposing the will have made out a case of fraud [*Tyrrell v Painton & Anor* [1894] P 151]. The vital and essential issue in cases of this kind is whether those propounding the will have discharged the burden of showing the righteousness of the transaction and that the paper propounded expresses the true will of the deceased [*Finny v Govett* (1908) 25 TLR 186 (CA)].

Sir JP Wilde in *Hall v Hall* (1868) LR 1 P & D 481 at p 482 defined undue influence as follows:

> Pressure of whatever character ... if so exercised as to overpower the volition without convincing the judgment.

A Viscount Haldane in *Craig v Lamoureux* [1920] AC 349 at p 357 explained it as follows:

> ... Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which does not express his mind, but something else which he did not really mean.

B

There is a difference between undue influence as understood in probate and in equity. In equity, persons standing in certain relationships to others are liable to have undue influence presumed against them in relationship to certain transactions. In probate, undue influence cannot be presumed [*Parfitt v Lawless* (1872) LR 2 P & D 462 at p 468]; 'there must be coercion ... it is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence' [*Wingrove v Wingrove* (1885) 11 PD 81 at p 82].

C

D Undue influence is not bad influence but coercion [*Williams v Goude* (1828) 1 Hag Ecc 577 at pp 581, 596]. Persuasion and advice do not amount to undue influence so long as the free volition of the testator to accept or reject them is not invaded [*Parfitt v Lawless* at p 474]. Appeals to affection, ties of kindred, gratitude for past services, or pity for future destitution are legitimate; but not pressure exerted to overpower the volition without convincing the judgment [*Hall v Hall*]. There is no undue influence unless the testator is in such a condition that if he could speak his wishes would say 'this is not my wish but I must do it' [*Baudains & Ors v Richardson & Anor* [1906] AC 169 at p 184].

E

F Strictly, to upset a will, the undue influence must be shown to have been exercised in relation to the will itself. Where, however, there is evidence that the testator was so far under the influence of persons benefiting from his will that he was not a free agent, the conclusion may be warranted that undue influence was exercised in relation to the will, even if there is no direct evidence [*Boyse v Rossborough* (1857) 6 HLC 2 at p 51].

G Those alleging undue influence must prove it. It is not sufficient to show the circumstances attending the execution are consistent with its having been procured by undue influence. It must be shown that they are inconsistent with any other hypothesis [*Boyse v Rossborough* at p 51]. Even if the power to overbear the will of the testator is admitted, it must be shown that such power was exercised, and that the circumstances of the execution are inconsistent with any other view but undue influence [*Craig v Lamoureux* [1920] AC 349]. Nevertheless in many cases in which the court has not been satisfied that there was undue influence, and even in cases where undue influence has been positively disproved, the court has pronounced against the will propounded because the circumstances have excited its suspicion and vigilance, and it has not been satisfied as to the righteousness of the transaction [*Barry v Butlin* (1838) 2 Moo PC 480; *Fulton v Andrew* (1875) LR 7 HL 448; *Re Hartley, Hartley v Fuld (Fuld intervening) (No 3)* [1965] 3 All ER 776]

H

I

Fraud unlike undue influence does not involve any degree of coercion. A false representation about the character of an individual, made to the testator for the purpose of inducing him to revoke a bequest made in favour of that individual, or to exclude the person so calumniated from any benefit in his will is a strong instance of fraud [*Allen v M'Pherson* (1847) 1 HL Cas 191 at p 207].

The standard of proof, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, is the criminal standard of proof beyond a reasonable doubt; where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, the civil standard is applicable [*Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, the deceased)* [1997] 2 MLJ 45].

The formal validity of the 1992 wills

Section 134 of the Evidence Act 1950 provides that 'no particular number of witnesses shall in any case be required for the proof of any fact'. This means that the testimony of a single witness, if believed, is sufficient to establish any fact.

In the case of wills, an instrument required by law to be attested and subscribed by two or more witnesses, 'it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence' (s 68 of the Evidence Act 1950). '...The evidence of one of the attesting witnesses, if he deposes to due execution, is sufficient' (17 *Halsbury's Laws of England* (4th Ed) para 892). This means that the evidence of one of the attesting witnesses, if believed, is sufficient to prove due execution.

In the case of the 1992 wills, there was a proper attestation clause and 'one attesting witness at least' who deposed to due execution on 3 August 1992. That would have been sufficient ordinarily to prove due execution. That would have been sufficient, even in this extraordinary situation where the second attesting witness deposed to the contrary, to prove due execution if Lim's evidence is believed. The tricky question is whether Lim could be believed.

According to Howard, he prepared the 1992 wills — one set each of the 1992 Malaysian, Thai and US wills. Then, there could only have been a set of each of the Malaysian, Thai and US (1992) wills. Except that Cheng Hum produced, confounding the latter assumption, a second Thai will dated 3 August 1992 (D2D) apparently bearing the signatures of the deceased, Lim and Dr Gafoor, a second Thai will that should not exist at all if it was true that the 1992 wills were the only wills executed on 3 August 1992. Adding to the intrigue, the provisions of the second Thai will were identical to the provisions of the 1992 Thai will, except that the second Thai will was not a replica of the 1992 Thai will; identical provisions were not identically positioned in the two documents — cl 2 for example

A was found in p 1 of the 1992 Thai will but in p 2 of the second Thai will, and the pagination was printed on the top half of one but the bottom half of the other. It means that the second Thai will could not have been prepared nor printed on the one occasion as the 1992 Thai will.

Both Howard and Lim denied that they prepared the second Thai will.
B Howard said he had no knowledge of the second Thai will when he left Penang for the US on 5 August 1992. Lim firmly maintained, even when a copy of the second Thai will (then ID11) was before him, that he did not attest and he had not seen the second Thai will. Plainly, the execution of loose sheets after 3 August 1992 was vehemently denied.

C Mr Koh: I put it to you ... what you testified about Lim Cheng Chuan coming on 26 August 1992 with loose sheets for the deceased's signature is a lie.

Beng Tatt: I don't agree.

But Lim admitted, when the second Thai will (D2D) was before him, that his signature was on the second Thai will. Lim explained that the 1992
D Thai will (D2B) had mistakes, that the second Thai will was to rectify the mistakes in the 1992 Thai will, and that he forwarded through Beng Tatt the second Thai will to Dr Gafoor for Dr Gafoor's signature and rubber stamp.

There was agreement therefore, albeit impliedly, that the second Thai
E will was prepared after the execution of the 1992 Thai will, and that the 1992 Thai will was the template for the second Thai will. Indeed, without the 1992 Thai will as template or precedent and save for a highly unlikely coincidence, the content of the second Thai will could not have been identical with the 1992 Thai will. Whoever prepared the second Thai will
F must have had the 1992 Thai will, or, the computer file in Howard's laptop computer.

Lim testified that he took possession of the 1992 wills immediately after it was executed, that he handed the 1992 wills to Beng Tatt and instructed Beng Tatt to obtain Dr Gafoor's rubber stamp, that he kept the 1992 wills in his office safe and that he only removed the 1992 wills from
G his safe after the death of the deceased. It means that Lim had possession of the 1992 wills at the material time. As observed in the foregoing, whoever prepared the second Thai will must have had the 1992 wills or the computer file from Howard's laptop computer. That would only have been Lim, Howard or Richard; Richard said he had access to Howard's
H laptop computer. However, all three denied that they prepared the second Thai will. Howard said he deleted the computer file after he printed the 1992 wills and Richard said he had no knowledge whatsoever of the preparation or execution of wills. Lim said, 'the second Thai will was there when I reached the deceased's house'. Nonetheless, the second Thai will was the irrefutable testament, despite the chorus of denials, that one, at
I least, was not speaking the truth.

The following evidence and the deductions that could be drawn come to mind. After 5 August 1992, Howard was not in the country. Richard

could have prepared the second Thai will, except that Howard said that he deleted the computer file after he printed the 1992 wills. Lim said he handed the second Thai will to Beng Tatt. Lim had possession of the 1992 wills — the template for a second Thai will — at the material time. Only Lim was directly linked to the second Thai will. Evidently, the evidence was pointing to Lim as the maker of the second Thai will.

Mr Foo contended that the deceased could have prepared the second Thai will. With respect, the deceased could have, if only he had the template — the 1992 wills from Lim, or Howard's computer file from Howard — he never had; Howard testified that he deleted the computer file after he printed the 1992 wills and Lim said that the 1992 wills were constantly with him. The maker of the second Thai will could only have been from the side propounding and or supporting the 1992 wills; and after 3 August 1992, Lim was the only one with the template and the only one directly linked to the second Thai will.

Lim's demeanour in the witness box also left much too much to be desired. Under examination-in-chief and when referred to a copy of the second Thai will (D11), Lim testified that the second Thai will and or copy was never in his possession. 'I have never seen the original of the (second Thai will)', Lim said. Under cross-examination by Mr Khoo, Lim testified that he had no knowledge whatsoever of D11. Still under cross-examination by Mr Khoo, Lim denied that his signature was on the copy of the second Thai will or that he attested the second Thai will. So clearly up to that point, Lim repudiated all knowledge of the second Thai will. Then Lim made a dramatic turnabout; cross-examined by Mr Yeoh and when the second Thai will before him, Lim conceded like a bolt out of the blue that D11 was a copy of the second Thai will and that his signature was on the second Thai will and on D11.

What was the explanation for that volte face? Lim said he forgot about the second Thai will. Perhaps. But that could not explain why Lim's memory was enkindled by the second Thai will but not by an identical copy, as if an original or copy rather than the text that mattered, when he was shown an identical copy of the second Thai will? Further to his admission that his signature was on both the second Thai will and D11, Lim related that: (i) the 1992 Thai will had mistakes, (ii) the deceased was not happy with the mistakes and the deceased arranged for a second Thai will to be typed, (iii) a date was fixed for Dr Gafoor and him to witness the execution of the second Thai will, (iv) Dr Gafoor did not turn up on the appointed date, (v) the deceased signed the second 1992 Thai will in his presence, and, (vi) the deceased kept the second Thai will. But in rendering that testimony, (i) to (vi), Lim was materially changing his testimony. Gone was his testimony that the deceased did not sign any other documents (meaning wills) after 3 August 1992. Gone was his testimony that all wills were executed at Pykett Avenue on 3 August 1992. Gone too was his testimony that he never handed any documents to Beng Tatt for Dr Gafoor's signature. Then, it was that the deceased signed a will after 3 August 1992 and that he attested a will of the deceased (second 1992 Thai will) without the presence of a second attesting witness.

Lim explained that he had forgotten about the second Thai will. As said, perhaps. It should be said though that the second Thai will was not sprung upon Lim. Lim affirmed in his affidavit dated 10 February 1995 (enclosure 20 in 22–271–94) that he could not remember anything about the second Thai will. Therefore, Lim was alerted in 1995 of the possible existence of a second Thai will, and Lim had time enough to mull, to reflect and to do some real soul-searching on a second Thai will long, long before he entered the witness box. And Lim was a witness who could recollect the nits and minutiae of all the happenings he said he witnessed at Pykett Avenue on 3 August 1992, even though his professed role was limited to the attestation of wills that Howard prepared. Then could it be, given that Lim was endowed with some capacity for recollection, that Lim's memory of the second 1992 Thai will, if even dormant, was so dead that it could not be enkindled even by an identical copy? And if Lim's memory was in such deep recess that an identical document (D11) could not jump start it to life, then how could the second Thai will mend Lim's memory any better? Then how could it be explained that the production of the second Thai will could bring Lim's memory to life where an identical copy had utterly failed before? Lim attested the second Thai will. He said a date was fixed for Dr Gafoor to attest the second Thai will. He attested the second Thai will after 3 August 1992. Given that active role, it was just not probable that Lim could have forgotten the second Thai will he was so vehemently denying from the witness box. It could be said only that Lim was stonewalling, and stonewalling he was, until he was overwhelmed by the probably unexpected production of the second Thai will, when further denials would be futile, into owning up to his knowledge and to his active role in the second Thai will.

It was remarked in the foregoing that Lim abandoned his prior testimony — the deceased did not sign any documents (meaning wills) after 3 August 1992 and all wills were executed at Pykett Avenue on 3 August 1992 — after he was confronted by the second Thai will. But Lim did not just abandoned his prior testimony; he turned his testimony around. Where he testified that all wills were executed on 3 August 1992, meaning that no wills were executed after 3 August 1992, he then testified that the deceased executed a second Thai will after 3 August 1992 without the joint presence of witnesses and that he attested that will after 3 August 1992. Where he denied all knowledge of a second Thai will, he then rendered a saturated account of the second Thai will. Evidently, Lim could invert his testimony with ease but without any scruples whatsoever.

Mr Koh submitted that the first to third defendants should not suffer on account of Lim's demeanour. With respect, it should have been said just as well that the first to third defendants should not profit either. Through Lim, the first to third defendants sought to prove due execution of the wills they propounded. If Lim is believed, due execution is proved. If Lim is disbelieved, it only stands to reason that due execution might not be proved (might not for the time being until Dr Gafoor's testimony has been considered).

All along, it was the plaintiffs' case (and adopted by the fourth and fifth defendants) that the 1992 wills were reconstructed by the first to third defendants whilst it was the first to third defendants' case that the deceased only executed the 1992 wills and no other wills on 3 August 1992 and that the 1992 wills were not reconstructed wills. The plaintiffs adduced evidence that the deceased executed wills in loose sheet form, that further loose sheets were signed and subscribed after 3 August 1992, and that Dr Gafoor subscribed those further loose sheets without the joint presence of the deceased and Lim. Need it be said that the integrity of the 1992 wills, if Dr Gafoor is believed, could be irreparably damaged, as the execution of further loose sheets after 3 August 1992, quite apart from the question of formal validity, would not weaken the case that the 'wills' executed on 3 August 1992 were reconstructed and would also put the identity of the 'wills' executed on 3 August 1992 into serious doubt. Put bluntly, a second Thai will — clear-cut evidence that the deceased executed more wills than was pleaded by the first to third defendants — could not enhance the prospects of the 1992 wills. But put away, the allegation that the 1992 wills were reconstructed would be hard-pressed to prove. Given the importance of the second Thai will, it could be asked if Lim's denial in the witness box was to screen out crucial evidence or to conceal the fact that the second Thai will was not executed in accordance with the legal requisites. Be that as it may, it was crystal clear that Lim was not a credible witness. Even Mr Foo reluctantly admitted that he had difficulty with Lim's credibility. Lim testified that the 1992 wills were the only wills executed and that he had no knowledge whatsoever of the second Thai will. Doing so, he nailed his colours to the mast. He was contradicted by the second Thai will. He was hesitant and diffident when the second Thai will was produced before him. He said he had forgotten about the second Thai will but his admission of a fourth will (second Thai will) and his explanation for the existence of the second Thai will were not pleaded. In truth, Lim's credibility had gone to rack and ruin the moment the second Thai will was produced. He was forced to backpedal, to extricate himself from his erstwhile denials of the second Thai will. And what about the explanation for the second Thai will — a mistake in the date, on the cover and on the end page. Mr Koh contended that it was a plausible explanation. With respect, it was not a plausible explanation: a corrected cover need not be resigned by the deceased or Dr Gafoor, and the end page was already corrected and countered-signed by the deceased and Dr Gafoor. In any event, from Lim's account, some effort was taken to secure the second Thai will to rectify the mistakes in the 1992 Thai will. Then, why was the second Thai will not propounded? Instead, inexplicably, the 1992 Thai will with the mistakes was propounded.

Section 134 follows the maxim, *testimonia ponderanda sunt non numeranda*, that testimony is to be weighed and not counted. ' ... more regard is to be paid to the character of the evidence adduced in support of case than to the number merely of the witness who gave it; for the evidence of two respectable and credible witnesses is of more value than of a dozen witnesses of notoriously abandoned and profligate character' (*Trayner's*

Latin Maxims at p 599). ' .... the court is concerned with the quality and not quantity of evidence' [*Sarkar* at p 1958]. The weight to be attributed to evidence, *testibus non testimoniis credendum est*, 'depends upon the character and credibility of a witness more than upon the probability or improbability of his statements. The value of the evidence given is to commensurate with the honesty and truthfulness of the witness; evidence as to an improbable fact spoken to by a witness above all suspicion deserves and receives more weight than the evidence of a doubtful or incredible witness regarding a fact itself very probable' (*Trayner's Latin Maxims* at p 599).

Mr Foo submitted that the integrity of the 1992 wills, even in spite of the second Thai will, was intact. However, the second Thai will was the irrefutable proof that the deceased executed more 'wills' than was pleaded by the first to third defendants. It was revealing proof that Lim was not adverse to his attestation of wills without the presence of a joint attesting witness. It was also revealing proof that Lim was not adverse to his attestation of a will not correctly dated — the second Thai will executed after 3 August 1992 was dated 3 August 1992.

Lim was not sagacious from the start. He knew, even in 1989, that Cheng Bok, Cheng Poon and Cheng Liat were fighting hammers and tongs. He knew that Cheng Poon coveted absolute control of the properties listed in the 1989 deed. He knew that that 1989 deed was not performed by the deceased. He knew that Howard prepared the 1992 wills that would give control of the estate to Cheng Poon and his two sons. He knew that the deceased had just suffered a stroke. Under those circumstances, Lim ought to have approached the 1992 wills, if even wills of the deceased, with circumspection and with a healthy respect for transparency, to rebut any accusation, and Lim who had knowledge of the brothers' tussles could not say that an accusation of impropriety was not foreseeable, that the 1992 wills were not wills of the deceased. Surely, vigilance would have been the order of the day, to meet and to rebut any future accusation of any impropriety. Yet Lim, a legal practitioner of 34 years' standing in 1992 (see *Majlis Peguam Legal Directory 1996*) who ought to have known, attested the 1992 wills, the impression he gave, as run of the mill wills. He sought not even a moment alone with the deceased to ascertain if the 1992 wills were indeed wills of the deceased.

But it was far worse than not exhibiting the skill of an ordinary competent solicitor. Knowing that the deceased had signed the second Thai will without the joint presence of two attesting witnesses, he attested that the deceased signed the second Thai will in the presence of two witnesses. To say the least, that was highly irregular. Knowing that the second Thai will was executed after 3 August 1992, he dated it as 3 August 1992. That was deceitful. Sadly, Lim, a senior lawyer called for the purpose of proving due execution could not be believed on his assertion that the 1992 wills were intact. Clearly, due execution was not proved.

Dr Gafoor testified that loose documents were forwarded to him on two separate occasions for his signature. His testimony that he signed loose documents after the 3 August 1992 was not challenged. On every

material aspect, he was corroborated by Beng Tatt. Indeed, his entire testimony, so it turned out, was authenticated by the second Thai will. Indeed, there was no reason to doubt Dr Gafoor, a witness who was consistent throughout his testimony. The only possible blip was his evidence, as was the case with Beng Tatt's evidence, that Richard was at Pykett Avenue on 3 August 1992. But that did not make him an unreliable witness, as the overall veracity and integrity of his evidence was not at all adversely affected.

Section 5 of the Wills Act 1959, in pari materia with s 9 of English Wills Act 1837, leans towards upholding and not striking down the 1992 wills because of formal defects. In the instant case, it was not a case of mere formal defects. Section 5 was not respected. Section 5 was desecrated. In more ways than one, the 1992 wills cannot be admitted to probate; clearly, due execution was disproved.

The 'gifts'

It is necessary, on the subject of the 'gifts', to turn back a few years, to 1988.

By all accounts, the deceased and his wife were devoted to each other. The loss of his wife in 1988, when he was 82 and well in his climacteric years, down in the dumps some witnesses said, would have been extremely hard for the deceased. However, after a short period of grief, the deceased was his old self. Things were looking up. He was on the rebound. He had the companionship of a young woman, and he found, according to Cheng Bok, new found freedom and seventh heaven. He had the unfailing company of Cheng Poon and Cheng Poon's children. Cheng Hum and Cheng Liat visited daily, Bok Eng resumed her visits to Pykett Avenue, and Cheng Bok and Liang Imm were frequent visitors. Seemingly, things could not have been any better. The family was one, the appearance anyway, and the deceased could look forward, reasonably, to gently live out his last years succoured by the comfort and support of his children. But that was not to be. Soon, Cheng Liat was complaining to the deceased that the 1989 deed was not fair to him and Cheng Bok. Thereafter, the deceased set into motion the train of testamentary and other dispositions in this proceedings.

Now, regardless whether those testamentary and other dispositions were deeds of the deceased or deeds of his children or any of them, for one reason or another the deceased was losing his children. In late 1990, Cheng Liat was barred from Pykett Avenue. Soon thereafter, Cheng Hum fell foul of the deceased. Liang Imm became the only regular visitor. Cheng Bok in Johore Bahru visited whenever he could. The deceased had Say Bee and Beng Tatt, but only Cheng Poon, Bok Eng, Richard, Howard and Gim Chuan, of his children and grandchildren, were constantly with him. Indeed, Cheng Poon (and Cheng Been) was the only child throughout with the deceased. Liang Imm and Cheng Hum, raised by their grandparents, only lived with the deceased for about five years. Cheng Bok, who was not living at Pykett Avenue after 25 and stayed away from Pykett Avenue for 10 years, was like a long lost son from afar — Johore

A Bahru. Cheng Liat who was not living at Pykett Avenue after 15 and then worked in Kuala Lumpur only returned to Penang in 1988.

So, by the end of 1990 or beginning 1991, Cheng Poon was the only child eternally with the deceased. It seemed that Cheng Poon was the only son that the deceased could fall back and count on, regardless of the state B or shape of his relationship with his other sons. It seemed that the deceased and Cheng Poon were inseparable. Nothing would move Cheng Poon from Pykett Avenue or from his father. Otherwise, how could it be explained that Cheng Poon would not even follow his wife when she walked out on Pykett Avenue. Not surprisingly, even Cheng Bok admitted so, Cheng Poon, seemingly a paragon of filial devotion, was the favourite son of the C deceased. And Cheng Poon, given that he was living and consorting all the time with the deceased, would have been closer, much closer to the deceased than any of his brothers. Admittedly, Cheng Liat and Cheng Hum, whilst they were visiting Pykett Avenue, would have had a certain relationship with the deceased. After all, they were sons of the deceased. D But they were never as close as Cheng Poon was to the deceased in the last years of the deceased's life. Anyway, whatever, by the end of 1990 or beginning 1991, Cheng Liat and Cheng Hum were *persona non grata* and remained so at Pykett Avenue until the day the deceased died. Therefore, by the end of 1990 or beginning 1991, whether hatched by Cheng Poon or not, the deceased was only relating to two sons, the ever present Cheng E Poon and the faraway Cheng Bok. According to Cheng Bok, he visited the deceased every three or four months. Each visit, he stayed for two or three days, as Cheng Poon disliked him staying too long. There should be no prizes for guessing which son was in the saddle.

The year 1991 was a tranquil year at Pykett Avenue. Cheng Liat and F Cheng Hum were not calling, but Liang Imm and Cheng Bok even if not visiting enough were at least visiting. Hamid was still a regular visitor. Say Bee and Beng Tatt were still in the service of the household. Cheng Poon and family was around, as always. Bok Eng who had moved her workshop into an annex of Pykett Avenue, would be resuming residence soon at Pykett Avenue. Gim Chuan was also around. And every six months, G Richard and Howard would be home. The year 1992 was the same except that Hamid was not visiting as often as before.

Already, it could be observed, that the life of the deceased, beginning from the date of death of his wife, was becoming more and more focused and more and more centered around Cheng Poon and his family. Where H he had the daily company of three sons (Cheng Hum, Cheng Poon and Cheng Liat, during meal time at least), he would only have, beginning 1991, Cheng Poon and family. Where he had Hamid, a bosom friend who advised him on family and financial matters, by July/August 1992, he had no friend. By then, in all his daily affairs, the deceased was only interacting with Say Bee, Beng Tatt, the driver and Cheng Poon and his family, and I Cheng Poon and his family were the only persons continually with the deceased. According to Say Bee, before her death, Ooi Geen Peen ran the household whilst the deceased instructed on financial matters; after Ooi Geen Peen's death, Cheng Poon was giving instructions on the financial

matters of the deceased. It would be surprising indeed if the deceased, old and grizzled, whose health could have been as good as permitted by his age (86 in 1992), his history of prostate enlargement and recent surgery, his impending stroke and then death a few short months later, was not totally reliant on Cheng Poon and his family. In July 1992, at 86, the deceased suffered a stroke. By then, old and decrepit of body, his spirit blighted by a recent stroke, and in the final flush of his life, the deceased would have been totally dependent on Cheng Poon, his ever present son, and on Cheng Poon's family for all his daily needs and daily care.

In June 1992, the deceased received approximately RM6.3m from the sale of the Batu Ferringhi land. By July 1992, all that money was gone, in the main to Cheng Poon and his family. The plaintiffs pleaded that the first to third defendants misappropriated RM6.4m. Cheng Poon and his sons pleaded that those monies (and cars) were gifts from the deceased. The plaintiffs impugned the good faith of all those purported gifts. They impugned as well the transfer of the Teluk Bahang land.

It is necessary, to settle that controversy, to understand the law applicable to gifts.

Undue influence in equity/contract

'As between persons dealing on a footing of complete equality, there is no presumption against good faith. So, ordinarily a person who challenges the validity of a transaction on the ground of fraud, undue influence and charges his opponent with bad faith has the burden of proof. There is an exception to this rule where a fiduciary or confidential relationship subsists between the contracting parties, eg guardian and ward, trustee and cestui que trust, parent and child, physician and patient, preceptor and disciple, etc. The rule applies to parents, executors, administrators, trustees, etc who take any benefit in respect of any property entrusted to their care. Where on account of such relationship one of them is in a position to exert undue influence or 'dominion' over the other and takes any benefit from him, the burden of proving good faith of the transaction is thrown upon the dominant party, ie the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining show such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position and that no information which should have been communicated has been withheld' (*Sarkar on Evidence* (14th Ed) p 1463).

Accordingly, s 111 of the Evidence Act 1950 provides:

> Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence,

A the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Section 111 applies to wills [*Nandalal v Dasarathi* 61 CLJ 304], so it would appear from *Sarkar*'s proposition at p 1465:

B ... testamentary dispositions are excepted from the presumption of undue influence which arises in cases of non-testamentary disposition between parties standing in fiduciary or confidential relationship; in the case of wills, the burden of proving undue influence is on the person who alleges it [*Boyse v Rossborough*]. Section 111 does not, on the face of it, make an exception in favour of wills ... But as s 111 speaks of 'a transaction between parties' which implies bilateral documents whereas a will is an unilateral document C ... an exception may be created in favour of wills ... The burden of proving testamentary capacity and execution is on the proponent. When the person benefited by the will is found to be in a position of active confidence towards the testator, there does not appear to be any reason why the general rule of presumption of undue influence should not arise.

D The principle on which the court acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed [*Huguenin v Baseley* 14 Ves 273 at p 286; Kerr p 182]. If it is established that the defendant was in a E position to dominate his will and that the transaction was unconscionable, the burden of proof of absence of undue influence rests upon the defendant [*Ballo v Parasam* 1972 HP 33].

The jurisdiction of the court to relieve undue influence is as wide and as flexible as the exigency of the case, and even exercisable without any proof F of dominance of the will of a party to a transaction.

In *National Westminster Bank plc v Morgan* [1985] 1 All ER 821 at p 831, Lord Scarman said:

... There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, G not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's folly or of the undue H influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case.

In *Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah* I *Mohd & Ors and other appeals* [1996] 2 MLJ 265 at pp 310, 314–315, Gopal Sri Ram JCA said:

Undue influence, like all other equitable doctrine, is an extremely flexible concept. Subject to policy considerations, the categories in which it may

operate are therefore not closed. For this reason, it is important to apply the doctrine, as housed in s 16 of the Contracts Act 1950, to varying fact patterns in a flexible manner. This is to be done by interpreting s 16 in a broad and liberal fashion. Being a remedial provision — in the sense that it is designed to relieve obligations — it should, in our judgment, be given a liberal interpretation. Even in cases which are not *stricto sensu contractual* in nature, the section may be resorted to by analogy. Another reason for adopting this approach to interpretation lies in the absence of any intention on the part of Parliament to alter the doctrine or to deprive it of flexibility it has acquired through historical development ... [T]he proof of dominance of the will of a party to a transaction — be it a gift, ... by the other party to the transaction is not a sine qua non of the doctrine of undue influence. The doctrine applies with equal force where, from the proved or admitted facts, there is shown a relationship of confidence and an abuse of that confidence by the person in whom it was reposed.

Whereas the Evidence Act places the burden of proving the good faith of the transaction on the party in a position of active confidence, the Contracts Act 1950 prescribes the context in which a contract is said to be induced by 'undue influence'. The relevant provisions of the Contracts Act 1950 read:

10 (1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

13 Two or more persons are said to consent when they agree upon the same thing in the same sense.

14 Consent is said to be free when it is not caused by —

(a) coercion, as defined in section 15;

(b) undue influence, as defined in section 16;

(c) fraud, as defined in section 17;

(d) misrepresentation, as defined in section 18; or

(e) mistake, subject to sections 21, 22 and 23.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

15 'Coercion' is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

16 (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

A (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) (a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction B appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

(b) Nothing in this subsection shall affect s 111 of the Evidence Act 1950.

C 17 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(a) the suggestion, as to a fact, of that which is not true by one who D does not believe it to be true;

(b) the active concealment of a fact by one having knowledge of belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive; and

E (e) any such act or omission as the law specially declares to be fraudulent.

19 (1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

(2) A party to a contract, whose consent was caused by fraud or F misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

20 When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose G consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just.

Section 16(3)(b) provides that 'nothing in this subsection shall affect s 111 H of the Evidence Act 1950'. However, there is a difference between s 111 of the Evidence Act and s 16(3) of the Contracts Act. Under s 111, whenever the good faith of a transaction between persons, one of whom stands to the other in a position of active confidence is in question, there is a presumption against the deed and the burden of proving good faith is I on the person who holds the position. But under s 16(3), the burden of proving good faith is thrown on the person who holds the position only when the transaction appears on the face of it, or on the evidence adduced to be unconscionable' (*Sarkar* at p 1464; see also *Datuk Jagindar Singh &*

Ors v Tara Rajaratnam [1983] 2 MLJ 196 at p 205). However, with regard to s 16(2) of the Indian Contract Act, in the case of gifts or settlements where the donee or the settlee is shown to have been a person in real or apparent authority or in a fiduciary relationship to the donor or settlor's mental capacity was temporarily or permanently affected by reason of age, illness or mental or bodily distress, the onus is upon the donee or settlee to prove that the gift or settlement was not brought about by undue influence (see *Venkataramier v Krishnammal* 52 Mad LJ 20; AIR 1927 Mad 259).

'The words "active confidence" should, in order that the law may be really protective, receive a wider interpretation [*Benoy v Santi* 40 CWN 45; 62 CLJ A99]. (Active confidence) may be presumed to exist as a natural consequence of the condition of the parties, though it be not actually proved that the one habitually acted as if under the dominion of the other. There are many relations of common occurrence in life from which the court presumes confidence put in the general course of affairs and influence exerted in the particular transaction complained of [*Smith v Kay* (1859) 7 HL Cas 750]. Persons may therefore not only be proved by direct evidence of conduct, but presumed by reason of standing in any of these suspected relations, as they be called, to a position of commanding influence over those from whom they take a benefit. In either case, they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence and was not given with due freedom and deliberation. They must take upon themselves the whole proof that the thing is righteous. A stringent rule of evidence is imposed as safeguards against evasion of the substantive law (*Pollock on Contract* p 581)' (*Sarkar* at pp 1467–1468).

Undue influence is inferred from the special relationship between the parties, quite apart from proof of fraud or unfair advantage. The doctrine of undue influence and its scope were considered in *Allcard v Skinner* (1887) 36 Ch D 145. Lindley LJ observed at p 183:

> As no court has ever attempted to define fraud, so no court has ever attempted to define undue influence, which includes one of its many varieties ... .

Lindley LJ thus explained the doctrine of undue influence (at pp 182–183):

> The principle must be examined. What then is the principle? Is it, that is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other person? In my opinion, the doctrine of undue influence is founded upon the second of those two principles. Courts of Equity have never set aside gifts on the ground of folly, imprudence, or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction. *Huguenin v Baseley* 14 Ves 273 is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with ... On the other hand, to protect people from being forced, tricked or

misled in any way by others into parting with their property is one of the most legitimate objects of all laws.

Cotton LJ classified the gifts that could be set aside:

> These decisions may be divided into two classes — first, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor or donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor ... The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases, the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom from being abused.

Pollock's *Indian Contract Act* (7th Ed) p 92 says:

> It is impossible to find plain and clear-cut categories for transactions which are often obscure and complicated, and sometimes purposely made so. Practically the most important thing to bear in mind is that persons in authority, or holding confidential employments such as that of a spiritual, medical, or legal adviser, are called on to act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional work done) from those who are under their authority or guidance. In fact, their honourable prudent course is to insist on the other party taking independent advice.

The special relationship of confidence between parent (or person in loco parentis) and child is statutorily recognized [see illustration (a) in s 111]. But special relationship is not confined to the illustrations in s 111. It extends to all varieties of relations in which dominion may be exercised by one over another and applies to every case where influence is acquired and abused. Undue influence is not possible without a special relationship of confidence between parties, where one reposes trust and the other retains the influence. By the same token, undue influence is possible where there exists that special relationship; accordingly, the party holding the position of confidence, and it could be a child over his parent, must dispel bad faith in the pecuniary transaction.

In *Carpenter v Heriot* (1759) 1 Eden 338, Lord Landgale MR observed:

> Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and a child, the child being of full age; but everybody will affirm in this court that if there is a pecuniary transaction between parent and child, just after the child attains the age of 21 years, and prior to what may be called a complete 'emancipation' without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child ...

Perhaps, the sentiment of the courts on undue influence is best expressed in *Tate v Williamson* (1866) 2 Ch App 55, where Lord Chelmsford LC said at pp 60–61:

> The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description ... the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction would not have been impeached if no such confidential relation had existed.

The importance of bringing home to the mind of the donor the consequences of his gift, to rebut a presumption of undue influence arising upon proof of the existence of a relationship between the parties, was particularly stressed by Lord Hailsham LC in *Inche Noriah v Shaik Allie bin Omar* [1929] AC 127 at p 136; 1 MC 79:

> In the present case, their Lordships do not doubt that Mr Aitken acted in good faith; but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships'view, the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties ... .

A more recent illustration is *Lim Kim Hua v Ho Chui Lan & Anor* [1995] 3 MLJ 165, where Steve Shim J held there was a special relationship between a grandmother (plaintiff/transferor) and her granddaughter (defendant/transferee) as the plaintiff, old, illiterate and with poor memory, was living with the defendant who provided her food and accommodation, as the plaintiff entrusted the management of her shophouse (the subject of the transfer) to the defendant and as the plaintiff was dependent on the defendant in both her physical and financial needs, and that undue influence could reasonably be inferred from those factors unless the defendant could show that she had not abused her position and that the transfer was not brought about by undue influence. The learned judge went on to say (at pp 173–174):

> ... She must show, by strict proof, that the plaintiff, at the time of executing the said transfer, had fully understood, not just the nature of the transfer but its full significance and effect: see *Zamet & Ors v Hyman & Anor* [1961] 3 All ER 933; [1961] 1 WLR 1442. I do not think that the first defendant has done so. She has merely allege that the plaintiff wanted to effect the said transfer in a hurry and that the contents therein were read and explained to her. In my view, this would not be sufficient to rebut undue influence. As Lord Eldon said in *Huguenin v Baseley* [1803–13] All ER 1 at p 3:

> 'The question is not whether she knew what she was doing, had done or proposed to do, but how the intention was produced; whether all that care and providence was placed round her, as against who advised her, which, from their situation and relation with respect to her they were bound to exert on her behalf.'

In the instant case, the defendant has not adduced evidence to show that all care and providence had been taken by her that the plaintiff was put in possession of all material facts and information so as to enable her to decide fairly, fully and freely what she wanted to do with her property. The plaintiff placed in the position she was in relation to the defendant, must be in full view and complete appreciation of what she was doing. In my view, the defendant should, in the circumstances of this case, not only have drawn the plaintiff's attention to the provisions of the 1983 will but also to the consequential effect or effects upon the execution of the memorandum of transfer. By keeping silent, she had actively concealed the material facts and thus committed dishonesty against the plaintiff.

Teluk Bahang land

Unlike the rest of the 'monetary gifts' where the alleged transactions were said to have been strictly between 'donor' and 'donees', the 'gift' of the Teluk Bahang was said to have taken place in the presence of several witnesses.

To recapitulate, Lim testified that the deceased instructed him, shortly after the deceased was discharged from LWE Hospital, to prepare a Memorandum of Discharge [PB1(290)] and a Memorandum of Transfer [DB1F(92)] of the Teluk Bahang land in favour of Cheng Poon. According to Lim, he received, in the morning of 3 August 1992, a telephone call requesting him to be at Pykett Avenue to witness the execution of the deceased's wills. Whilst waiting for the 1992 wills to be retyped, he took out the PA [DB1A(197)] and Memorandum of Transfer ('transfer') [DB1F(92)] he prepared and presented those instruments to the deceased for his signature. Lim testified that the deceased executed both the PA and transfer and then instructed Beng Tatt to call Cheng Poon who was then downstairs to execute the transfer. Beng Tatt called Cheng Poon who came upstairs and signed the transfer. After the execution of the PA and transfer, Howard brought out the 1992 Thai will for execution, Lim added.

However, Lim was not supported by any of the persons present at Pykett Avenue on 3 August 1992. Dr Gafoor who was seated next to the deceased and Lim when the PA and transfer were said to have been executed and would have seen the execution of the PA and transfer testified that the deceased only executed documents relating to wills and not of any other instrument. Beng Tatt who was standing next to the deceased testified that the deceased only executed documents relating to wills and that the deceased did not execute a PA or transfer on 3 August 1992. Howard, who testified that he saw his father signing some documents, did not say that his father was signing a transfer. And most pertinently, Cheng Poon who would profit if the transfer is validated but would lose

out if the transfer is invalidated and therefore would have defended the gift of the Teluk Bahang land, if it was indeed a gift, did not testify, when he had personal knowledge to affirm, that the transfer was a gift as pleaded. The only evidence supporting a 'gift' was the statements in the transfer attested by Lim, and Lim's testimony. But Lim's testimony on the gift of the Teluk Bahang land was not at all assuring.

Lim testified that he was asked on 3 August 1992 to witness the execution of the deceased's wills. Then, the purpose of his visit to Pykett Avenue on 3 August 1992 was to witness the execution of wills; Lim did not say that he was asked to bring the transfer or PA. Nonetheless, he had with him, the transfer and PA he prepared. Perhaps, with regard to the transfer and PA, Lim was prescient. As said, Lim knew of the squabbles between the brothers. He knew that Cheng Poon in 1989 had attempted to gain control of some of the assets of the deceased. He knew, with regard to the sale proceeds received from the Batu Ferringhi land, that Cheng Poon received cash (RM866,000) whilst Cheng Liat and Cheng Bok received, whereas it was patently unfair to them, pieces of paper (24 July 1992 deeds). An apple of discord was growing. Conflict was brewing. It was just a matter of boiling over. Lim should have been sagacious. So, why did it not strike Lim at all that Cheng Liat and Cheng Bok would find issue with the transfer? And was it not convenient, with witnesses around, to explain the transfer, for the benefit of the witnesses around if not for the deceased who might already have been acquainted? And, if the deceased acknowledged the transfer, would not Dr Gafoor depose to the good faith of the transaction? Evidently, as providence had it, Lim had Dr Gafoor, if he wanted him, as a supporting witness to vouch for the good faith of the transfer. Yet Dr Gafoor was spurned; instead, Lim shoved the transfer and PA to a man who recently suffered a stroke, without so much as a spurious reading of the transfer or a cursory explanation of the effect of that transaction. In the upshot, there was no evidence at all that the deceased understood that he was signing a transfer of the Teluk Bahang land to Cheng Poon. The deceased in the position he was in relation to Cheng Poon and his family ought to have been in full view of what he was doing. But there was no evidence at all that care and providence had been taken by Cheng Poon to ensure that the deceased was put in possession of all material facts and information so as to enable the deceased to decide freely what he wanted to do with the Teluk Bahang land. In the circumstances of this case, Cheng Poon, if not Lim, should have drawn the deceased's attention to the effect of the execution of the transfer. By keeping silent, Cheng Poon had actively concealed the material facts and thus committed dishonesty against his siblings if not against the deceased. There was no evidence as to how the intention of the deceased to transfer the Teluk Bahang land was formed; whether care and providence were placed round the deceased, as against those who advised him, which, from their situation and relation with respect to him they were bound to exert on his behalf. Even Lim admitted that the deceased did not give any reason for the said transfer. There was no evidence to rebut the inference that Cheng Poon's testimony if given would have been unfavourable to the asserted gift of the Teluk Bahang land. And Cheng Poon would not even deny Hamid's

testimony that he (Cheng Poon) instructed Hamid to transfer the Teluk Bahang land to himself.

In the final analysis, the gift of the Teluk Bahang land was totally reliant on a discredited witness who testified, whereas all others present at the same time and place said nothing of the sort, that the deceased executed a transfer at Pykett Avenue on 3 August 1992.

The cars and monetary dispositions

The plaintiffs pleaded that Cheng Poon, Richard and Howard, between March to July 1992, misappropriated RM6.4m from the deceased.

The following payments were made to the following persons.

Date	Recipient	Amount
17 June 1992	Cheng Poon	RM 197,000.00
	Cheng Poon	RM 866,000.00
	Cheng Poon	RM 512,063.70
	Bok Eng	RM 225,000.00
	Howard	RM 225,000.00
18 June 1992	Cheng Poon	RM 225,000.00
	Howard	RM 39,000.00
	Howard	RM 182,000.00
26 June 1992	Howard	RM 31,000.00
	Gim Chuan	RM 31,000.00
29 June 1992	Howard	RM 100,000.00
	Gim Chuan	RM 100,000.00
June/July 92	Richard	RM 121,567.35
		RM2,854,631.05

Richard, Howard and Bok Eng readily admitted, in their testimony or through their counsel, that the above payments were indeed received by Cheng Poon, Richard, Howard Bok Eng or Gim Chuan; but Howard asserted that he returned his cheque for RM225,000 to the deceased. Cheng Poon, Richard and Howard pleaded that those monies received were gifts from the deceased. But as the trial unfolded, a gift was not the only 'justification'.

Both Cheng Bok and Cheng Liat testified that their mother had promised to give to each of them (Cheng Bok, Cheng Poon and Cheng Liat) 15% of the sale proceeds that would be received from the sale of her Batu Ferringhi land. That sale was concluded. Hamid testified that he calculated for the deceased that 15%; Hamid made it out to be RM866,000. Therefore, that RM866,000 to Cheng Poon could be justified as Cheng Poon's 15% (not disputed by Cheng Bok, Cheng Poon and Cheng Liat). However, the reasons for the other payments were not that straightforward nor the 'gifts' pleaded.

In 1991, the Batu Ferringhi land was sold for RM7,501,032. Hamid testified that Tan Beng Seng of Tan Seng Brothers secured the purchaser and that he received a 2% seller's commission. Tan Beng Hin testified that

he and his brother (Tan Beng Seng), Hamid, Cheng Poon, and a friend of his brother were 'involved' in the sale of the Batu Ferringhi land. Tan Beng Hin testified that the deceased gave him 10% of the total sale proceeds to be shared by all five; he received in cash ¼ of the 10% before 18 June 1992, Cheng Poon received ¼ of the 10% to be shared with Hamid Merican, his brother received ½ of the 10%. Tan Beng Hin said that Bok Eng arranged the payment to him and to the others. It would appear that a sum of RM750,000 was paid as a sales commission to brokers; it was not a gift to the recipients. Tan Beng Hin denied all knowledge that a 10% sales commission was above the norm. Bok Eng testified that the deceased gave her a large sum to be paid to the brokers. She did not specify the amount. Bok Eng disagreed that she took the RM225,000 in exh PB1(325). Nonetheless, she agreed that only she could receive the RM225,000 in exh PB1(325). Pertinently, Bok Eng did not say that the monies her family received were gifts from the deceased.

Richard who admitted that his family received, between June and July 1992, a total of RM2.7m explained that RM512,063.70 was to settle the overdraft owing by the deceased and his father to the BBMB, Georgetown. He explained that Howard purchased a Mercedes SL with the RM350,000 given him by the deceased and that his father withdrew RM140,000 from the deceased's account, a day before the deceased died. Richard said that that RM140,000 had been accounted for; the balance (RM38,274), he said, had been paid into the trustees' account. So Richard indirectly deposed that the deceased gave RM350,000 to Howard. Again, pertinently, Richard did not say that the RM121,567.35 credited to him was a gift from the deceased. In fact, Richard did not offer any explanation, reason, excuse or rationalization, and none could be deduced from the evidence, for the RM70,000, credited to him.

Howard, who admitted that he 'received' RM352,000 from the deceased, testified cryptically that 'a significant part was for his schooling fund and that the rest was for a car ... (and) that the schooling fund, so long as he could finish his education, was not for any specific period'. He said that he endorsed a cheque for RM225,000, but that sum was paid to Tan Beng Hin; Howard said that the deceased, after he endorsed the cheque, took the cheque from him. He said that he did not instruct the payments in his favour. Each time he needed money, he approached the deceased. The deceased approved and instructed all payments to him. Beginning June 1992, he was receiving large sums from the deceased. He received all sums stated in PB1(326–333). Between 17 June 1992 to 29 June 1992, he received cheques totaling RM576,000 from the deceased; but he did not receive the said RM225,000. Before then, he was only receiving RM50 a week.

Both Bok Eng and Howard each denied having received a sum of RM225,000. However, the relevant crossed cheques [PB1(325/326)] in favour of Bok Eng and Howard could only have been credited, most reasonably, to Bok Eng and Howard or to their order. Even Bok Eng admitted that only she could receive that RM225,000 in exh PB1(325).

A Howard said that the deceased took that cheque from him after he endorsed that cheque [PB1(325)].

But the bank did not agree with Howard. Teoh Seng Chye, the Deputy Branch Manager of the drawer bank, DBBMB Pulau Tikus branch, testified that two sums of RM866,000 and RM197,000 were credited into B the joint account of Cheng Poon and Bok Eng and that the cheques for RM225,000 [PB1(352/326)] were credited to Bok Eng and Howard, the payees of those crossed cheques. Teoh Seng Chye who was testifying from incontestable records was not challenged. Undoubtedly, both Bok Eng and Howard received the RM225,000 they denied receiving.

C Cheng Poon, Richard and Howard pleaded that the monies they received were gifts. But pleadings are not evidence. The only evidence of a 'gift', and it came from Richard and Howard, was that the deceased gave RM350,000 to Howard for a 'so long as he would finish his education schooling fund and for a car'. Other than that, Richard's explanation for the payment of the RM512,063.70 could not be true, as the cheque in D favour of Cheng Poon (D35-A) was credited to Hamid's account in repayment of Cheng Poon's debt to Hamid; the redemption sum of the Teluk Bahang land was RM1,436,781.57 and not RM512,063.70. Bok Eng and Howard's denials that they received the two sums of RM225,000 were disproved. There was absolutely no evidence that the deceased gave RM139,000 to Gim Chuan. There was absolutely no evidence that the E deceased gave RM197,000, RM225,000 or RM512,063.70 to Cheng Poon.

Accordingly, in the absence of any evidence, not even a bare assertion, the payments: (a) RM197,000, RM225,000, RM512,063.70 to Cheng Poon, (b) RM139,000 to Gim Chuan, and (c) RM121,567.35 to Richard, F were not gifts. Accordingly, as the denials were disproved, the payments: (c) RM225,000 to Howard, and, (d) RM225,000 to Bok Eng, were indeed received by Bok Eng and Howard who failed to offer any reason or justification.

That leaves the RM352,000 that Howard said was given to him for his G schooling fund and for a car. Both Richard and Howard testified that the deceased only gave them RM50 a week. Whilst Richard was overseas, the deceased gave him US1,000. When Richard returned to Penang, the deceased gave him RM50 a week. Whilst Howard was overseas, the deceased gave him US$1,500 a month. Both admitted that the deceased before June 1992 had never given them any other monies. Howard admitted H that the deceased before June 1992 had never given him any money to buy a car.

Evidently, the deceased was not one who would allow his grandchildren, even those with him and therefore in the lap of luxury, to be spoilt by his wealth. The moment Richard and Howard returned to Penang, he I discontinued their overseas allowance and put them back on the local meager weekly allowance (RM50), even though Richard and Howard were grown men by then. He was also not one who would mollycoddle or

pander to his children. When he gave RM14,000 to Cheng Bok, he took in return three houses in Kulim. He gave a fixed monthly allowance (RM1,400, according to Beng Tatt) to Cheng Hum, Cheng Bok and Cheng Liat, though he shouldered as well their education/other expenses — RM1,000 to Cheng Hum, RM1,000 to Cheng Liat and RM5,000 to Cheng Bok. To Cheng Poon, the son under his aegis, he gave an occasional RM1,000 to RM3,000. Bok Eng and Gim Chuan each received RM50 a week. Sally Khaw, Cheng Liat's first wife was given £200 a year. Yes, the deceased had riches and wealth, but he was also prudent and restrained in his ways. Indeed, with a large brood as a millstone, the deceased had no choice but to be prudent and restrained, even though it was never a case of pinch and scrape, in his spending. He was not one who would play ducks and drakes with his money. He had far too good a head on his shoulders. As Beng Tatt said, 'the deceased was not easy or free with his money. He was concerned about his cash flow'. Neither was the deceased easy on his children's profligate ways, as he was angry, according to Richard, that Cheng Bok had charged the house he had given Cheng Bok. He was careful with money, to the extent that he maintained a record, who else accountable only to himself would do so, of his ancestral worship expenses.

The deceased was also one who could not afford to waste or throw away his money. He was rich, property wise, but he was not rolling in hard cash. From 1987, at least, he was constantly dogged by cash flow problems. He had to sell (a portion of Holding 10, 11(1) and 12, Mukim 14 NE District Ayer Itam) and borrow (RM1.5m from the BBMB) to keep the pot boiling. Hamid testified that the deceased needed the money. The deceased even forced Cheng Hum to sell the remaining Ayer Itam lands with him. The deceased could not wait for the land value to rise. According to Richard, in 1991 and 1992, the deceased was desperate for cash, to travel, to spend and primarily to settle his overdraft, and the deceased instructed brokers to sell his properties, including the Teluk Bahang land. Teoh Seng Chye testified that the overdraft account in 1991 was turning bad. Evidently, the deceased was going through a thin time. Then in 1991, as if god-sent, the Batu Ferringhi land was sold. Reasonably, the balance sales proceeds bringing deliverance but only payable in June 1992 would have been eagerly awaited. Reasonably, the deceased could not play ducks and drakes, and neither was it his nature, with the balance sales proceeds from the Batu Ferringhi land.

Then what was the reason for that orgy of handouts in June 1992 when the sales proceeds from the Batu Ferringhi land all but dissipated in the space of a few short days? The following exchange is both telling and pertinent.

> Mr Yeoh: How (would) you explain all these large sums in June 1992?
>
> Howard: He had cash only in June 1992, the proceeds from the Batu Ferringhi land.

Was that a plausible or reasonable explanation for that orgy of handouts in June 1992? He who had never given more than RM50 a week to Bok Eng,

Richard, Howard and Gim Chuan, was suddenly handing out hundreds of thousands of ringgit to them. He who had never given more than an occasional RM1,000 to RM3,000 to Cheng Poon, was suddenly handing out close to RM2m to Cheng Poon. He who had not done so before was dishing out money like water, like it was going out of fashion, like there was no tomorrow, all seemingly without any care that it was totally improvident. It was certainly improvident, nay, beneath improvident, as the deceased in December 1992, when he was yet not aware that he was having cancer and therefore would not be emptying his pockets, had less than RM10,000 — money that would not even tide himself let alone children and grandchildren over. It was just midsummer madness. Richard testified that the deceased intended just before he died to travel to Europe and purchase the latest Mercedes 600 SEL. Sadly, if that was true, the deceased was not even aware that his money was no longer in his hands.

Is it to be believed that the deceased suddenly abandoned his life long commitment to his children and grandchildren when he received the balance sales proceeds in June 1992? Is it to be believed that the deceased who needed the money (Hamid's testimony), who was desperate for cash to spend and to travel (Richard's testimony) and who quarreled bitterly with his eldest son (Cheng Hum's testimony) because his eldest son would not yield to his demand for the sale of the Ayer Itam lands to raise needed cash, would give it all away within the space of a few short days in June 1992? And is it to be believed that the deceased upon receipt of the balance sales proceeds was suddenly seized only by concern for Cheng Poon and his family to the extent that he divested his entire purse and even put himself in a highly disadvantageous position? Or as there a systematic exploitation of an old and sickly man at death's door? Were those around him lining their pockets?

As the saying goes, 'the proof of the pudding is in the eating'. There is no point in looking for any direct proof of any undue influence, for there is none, as the 'donor', a case of 'dead men tell no tales', is not around, and the 'donees', even if they exerted undue influence, did not and surely were not expected to say so. The indirect evidence, the facts and circumstances of the case was the litmus test. To recall Lord Scarmand, in *National Westminster Bank plc v Morgan* [1985] 1 All ER 821 at 831:

> ... it is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case.

And the facts of this case were not edifying. They were shocking. In June 1992, the balance sale proceeds payable in June 1992 was received. In May/June 1992, Howard returned home from the States. Perhaps that was a coincidence. On 17 June 1992, Cheng Poon received RM197,000, RM866,000 and RM512,063.70; Bok Eng received RM225,000 and

Howard received RM225,000. Perhaps that was a one off splurge. A day later, on 18 July 1992, Cheng Poon received RM225,000 and Howard received RM39,000 and RM182,000. Perhaps that was a sequel to the one off splurge. Eight days later, on 26 June 1992, Howard received RM31,000 and Gim Chuan received RM31,000. Perhaps that was a sequel to a sequel. But that was not the end. Three days later, on 29 June 1992, Howard received RM100,000 while Gim Chuan received RM100,000. In June/July 1992, Richard received RM121,567.35. On or about 3 July 1992, Cheng Poon instructed the early settlement of the loan outstanding (RM282,547.62) on the Rolls-Royce that Richard said the deceased gave to Cheng Poon. RM1,436,781.57 was paid to redeem the Teluk Bahang land that Lim said was given to Cheng Poon. RM750,000 was paid to 'brokers'. And so, inevitably, the coffers were emptied.

All in all, Cheng Poon and his family 'picked up' a total of RM4,573,960.51 [cash of RM2,854,631.32, RM282,547.62 for the redemption of the Rolls-Royce, RM1,436,781.57 for the redemption of the Teluk Bahang land], a veritable lion's share, or about 72% of the approximately RM6.3m received in June/July 1992 (see p 9 of the bundle of all agreed facts). Speaking of a lion's share, practically nothing was received by the other siblings. Obviously, the rhetorical question is whether Cheng Poon and his family could have had their incredible run of good fortune within the space of a few short days in June/July 1992, when they were receiving and receiving, whilst the deceased was just showering and showering tranche upon tranche on them.

It has already been said that the asserted gifts were not proved as gifts at all. Cheng Poon and family could not have had that incredible run of good fortune to the total exclusion of all others. Yes, the deceased had a soft spot for Cheng Poon. That was evident from the fact that Cheng Poon had more shares in the Thai corporate and a large provision in almost every pre-1990 will. But that is not to say that the deceased only cared for Cheng Poon. The deceased cared for all his children. It was just a matter of degree. He would not have forgotten or left the rest of his children to the elements. He amply demonstrated that in the case of Cheng Been, his luckless schizophrenic son, for whom he set up a special trust to ensure surely that Cheng Been would be financially supported even after him. The deceased did not just put bread on the table. He showed compassion to. According to Dr Tan, the deceased enquired on a breakthrough in the treatment for Cheng Been, sought his advice on medical treatment for Cheng Been in the United Kingdom and discussed the new drug that would be administered to Cheng Been. So, even as he was wrapped up with his own testamentary capacity, the deceased had not forgotten his hapless schizophrenic son. That was the measure of the deceased. The deceased had all his children (except Liang Imm), able or disabled, under his wings. In all pre-1990 wills, the deceased provided for all his children and grandchildren. His sons (including Cheng Been) and eight of his grandchildren were given shares in the Thai corporate. All his sons received monthly allowances. He gave allowances to most of his grandchildren. He educated Cheng Bok and Cheng Poon's children. He also educated Grace.

He gave an allowance to Bok Eng. He paid the expenses of Cheng Bok's wives. He gave money to Cheng Bok to marry a third time. He purchased a factory and installed Cheng Liat as the manager. He purchased a rubber estate and installed Cheng Hum as the estate supervisor. He gave properties to all his sons. Except for Liang Imm, apparently none was not provided for in one way or another. To the deceased, it could be said even that taking care of his children and grandchildren was his mission in life. It was probably second nature too. So why should a large sum of money in June/July 1992, even though some RM6.3m, as if the deceased was a mendicant who had never tasted money, change a habit of a life time? Indeed, there was no reason after all the years and then in the final flush to change at all.

As said, the deceased had a soft spot for Cheng Poon. Reasonably, a gift here and a gift there to Cheng Poon or his family would have been entirely plausible. After all, the deceased could not be expected to be equal to all his children. But it was not the character of the man to hand out tranche upon tranche to the point of total exhaustion of all that could be given to only one son. It was not the character of the man to be totally partial to one son, as he was reasonably even handed with all his sons. He gave allowances to the sons who were not gainfully employed (Cheng Hum and Cheng Poon) but not to the sons with a livelihood (Cheng Bok and Cheng Liat). But when Cheng Bok and Cheng Liat retired, he gave them monthly allowances just as well. To each son, he gave properties. Really, the deceased looked after all, and unless he had taken leave of his senses or was subjected to pressure, he would not have been as partial to Cheng Poon and his family as it would appear he was in June 1992. Hamid, Beng Tatt, Cheng Bok, and Cheng Liat all testified that the deceased agreed to carry out the wishes of his wife in giving Cheng Bok, Cheng Poon and Cheng Liat each 15% of the sales proceeds of the Batu Ferringhi land. The deceased was a man of his word. Then why would he not give to Cheng Bok and Cheng Liat their share of the sales proceeds of the land he inherited from his wife? In June 1992, there was more than enough to settle the RM866,000 to all three sons. There was no question of it not being enough. It was only not enough only because everything in the main went into the pockets of Cheng Poon and his family. But surely, being a man of his word, the deceased would have given to Cheng Bok and Cheng Liat their due, would he not, and being a man of prudence, the deceased would have save on the interests paid to Cheng Bok and Cheng Liat from July 1992 to April 1993, would he not, than lavishing it on some wishy-washy, how else to be described, 'so long as he would finish his education' schooling fund and for a car.

Mr Koh submitted that the reasons offered by the donees were not relevant. He contended that the reasons could be an excuse to ask for money, and that the excuse might have been disbelieved. He further contended that a gift per se is no ground to infer undue influence, unless that gift is so large or the transaction so improvident as not to be reasonably accounted for on the ground of friendship, relationship or ordinary motives. He added that there was no evidence of an improvident or large gift.

With respect, if the reason for a gift is not relevant, then how could the good faith of a transaction be judged? By just blindly accepting the donee's *ipse dixit* assertion, even if the 'donor' is not around to give his version? And if the reason for a gift is not relevant, then how would donors be protected from being forced, tricked or misled in any way by others into parting with their property? Surely, an alleged gift must be proved, and only if a gift is proved will the law not question the rationale no matter how capricious for the gift.

To get back on track, the only reason given for any of the monetary 'gifts' was that the deceased gave RM352,000 to Howard for his schooling fund and for a car. Other than Howard, none of the other 'donees' claimed that they received gifts from the deceased. not Cheng Poon, not Bok Eng, not Richard and Not Gim Chuan. Howard admitted that the deceased never gave him any money before June 1992 to buy a car. Howard admitted that the deceased only gave him RM50 a week. Then, it was entirely inconceivable that the deceased who controlled his spending and run a tight ship, relatively speaking, would have given Howard RM352,000 for a 'so long as he would finish his education' schooling fund and for a car.

Beyond any question, the deceased was worth many millions, many times over. A gift of RM352,000, in the light of his many millions, would not be so large or so improvident as would not be reasonably accounted for on the ground of his love for a grandchild. But it would be wrong to judge that RM352,000 in isolation, as that transaction was but one link in the chain of transactions that shackled the deceased so that he only had RM10,000 at the end of 1992 and RM14,000 on the day he died, the final link being Cheng Poon's withdrawal (RM140,000) a day before the deceased died when the deceased was in a coma, a final link that told its own tale, forcefully as well as graphically, that Cheng Poon, Bok Eng, Richard and Howard were taking and taking all that they could lay their hands on. Richard testified that that RM140,000 had been accounted for. But that was not pleaded. A gift was all that was pleaded.

With regard to the cars, Cheng Poon did not testify that the deceased gave him the Rolls-Royce and a Mercedes Benz 380 SEL. Only Richard said that the deceased gave those two cars to Cheng Poon. Richard also testified that Cheng Poon purchased the Ladybird and a Nissan sports car, and that Cheng Poon purchased the Ladybird with his own funds. But Richard did not testify that the deceased had gave him the BMW (BCU 8). Accordingly, except for the Rolls-Royce, Mercedes Benz 380 and Porsche, there was no evidence at all of a gift of any of the deceased's cars to Cheng Poon and his family.

However, the evidence was not consistent with a gift of the Rolls-Royce and Mercedes Benz 380 to Cheng Poon. It was only consistent with those cars being held by Cheng Poon for the deceased. The evidence clearly showed that the deceased registered his cars in the names of others. Hamid testified, and he was not challenged, that the deceased had several cars in the names of Cheng Poon and Richard and that the deceased told

him that Cheng Poon and Richard were holding the cars for Cheng Bok, Cheng Liat and Cheng Poon. On the same point, Beng Tatt who testified that the deceased registered his cars in Cheng Poon and Richard's names was also not challenged. Dr Tan testified, whilst he was cross-examined by Mr Koh, that the deceased said to him (on 27 January 1993) that he (the deceased) had purchased six cars — Rolls-Royce, Mercedes-Benz, BMW, Porsche, Peugeot and Chrysler Alpine — for his pleasure and for the use of his family, but that the Porsche was for his grandson, the Peugeot for his sons and the rest were 'for his pleasure'. Richard testified that sometime in early 1992, the deceased purchased a Rolls-Royce but registered it in his father's name. Richard also testified that in 1990/1991, the deceased purchased a BMW (BCU 8) but registered it in his name. Further, according to Richard, after the purchase of the Rolls-Royce, the deceased asked Cheng Poon to transfer a Mercedes 380 SEL to Cheng Poon, and the deceased also asked Cheng Poon to transfer a Mercedes Benz 280 purchased in 1988/1989 to Cheng Bok. According to Richard, the deceased had a passion for cars and always had 'a string of cars'. 'The deceased would have, at the very least, three cars at any point in time.' 'The deceased always had a beautiful sedan and other cars for His daily use.' Perhaps the Porsche, because Dr Tan said that the deceased said to him that the Porsche was for his grandson, was a gift to Richard. But where are those other cars of the deceased at any point in time?

The facts and circumstances showed that the coffers of the deceased were empty because it was broken into and that the cars (other than the Porsche) were expropriated. It had been proved, even if the plaintiffs had the burden of proving undue influence, that the facts and circumstances attending the gifts were entirely consistent with undue influence but entirely inconsistent with any other hypothesis.

Furthermore, and it was not the father and son relationship per se, undue influence could be presumed. The deceased, at death's door, was totally dependent, and in that sense beholden, to Cheng Poon and his family. From the evidence adduced, there existed that close confidential relationship where Cheng Poon and his family were persons with great influence and pull over the life of the deceased and in a commanding position to exert undue influence or 'dominion' over the deceased; the deceased and Cheng Poon, with regard to the gifts, were not persons dealing on a footing of equality.

Mr Kok submitted that the monetary gifts to Cheng Poon and his family were advancement from a father to his child. With respect, that was not the big picture. As said, the proof of the pudding is in the eating. The proved or admitted facts showed that the relationship between the donor and donee at or shortly before the execution of the gifts had been such as to raise a presumption that the donee had great influence over the donor — a natural consequence of the condition of the parties. Cheng Poon and his family took substantial benefits and unusual amounts from the deceased and the burden of proving good faith of the transactions was upon him and his family, the party in a position of active confidence. Indeed, to a very high degree of probability, those transactions could not have been if

Cheng Poon and his family had not been able to dominate the will of the deceased and had not used their position to obtain an advantage. The gifts were so large and so improvident as not to be reasonably accounted for on the ground of the relationship between the deceased and Cheng Poon and his family. In particular, the monetary transactions appeared on the face of it to be wholly unconscionable. In either case, whether under s 111 of the Evidence Act or s 16(3) of the Contracts Act, Cheng Poon and his family — who stood in such a relationship that while its continued confidence was necessarily reposed by the deceased and influence possessed by Cheng Poon and his family — were called upon to act with good faith and they had the burden of proving that the gifts were not brought about by undue influence. And they who had the burden of proof of absence of undue influence failed to show that the transactions were fair and reasonable, that no advantage had been taken of his position and that no information which should have been communicated had been withheld. They failed to dispel bad faith. Undue influence, that proved as well as presumed, was not rebutted. Strangely enough, Tan Beng Hin's evidence revealed that Cheng Poon, who had a duty to protect the deceased, even partook of, while his wife was paying out, and it could be ripping off, an unconscionable 10% sales commission (RM750,00) from the deceased. A son taking a commission from his father! Sadly, every imaginable pretext was used to draw off the deceased's money, even whilst the deceased was in a coma, and until there was none at all. How could it not be said that the proved or admitted facts showed a relationship of confidence and an abuse of that confidence?

The substantial validity of the 1992 wills

Strictly speaking, since formal execution was not proved and also disproved, need it be said on the balance of probabilities, it should not be necessary to delve into the substantial validity of the 1992 wills. Nonetheless, it was still desirable to do so, as it substantiated the absence of all good faith in the transactions in 1992.

Howard testified that the deceased made corrections to the 1990 wills, handed him (Howard) the corrected 1990 wills and told him (Howard) to type fresh wills following his (the deceased) corrections. Howard said he did not know why he was asked to prepare the 1992 wills. According to Howard, the following amendments were made to all 1990 wills: (i) Howard substituting Khaw Teik Lim as a trustee, (ii) the variation of five years to 30 years, (iii) the reduction of Teik Hock's interests from 4% to 2% and that 2% to Howard, the reduction of Teik Ghim's interests from 4% to 2% and that 2% to Richard, (iv) Teik Chye replacing Cheng Bok as a trustee in event of Cheng Bok's death, and (v) Howard replacing Cheng Poon in the event of Cheng Poon's death.

However, those five amendments that Howard listed were not the entire changes to the 1990 wills.

The 1992 Thai will made two major changes to the 1990 Thai will; (i) whereas Cheng Poon (governing trustee), Cheng Bok, Richard and

A Teik Lim were the trustees, it then appointed Cheng Poon (governing trustee), Cheng Bok, Richard and Howard as the trustees, and, (ii) whereas it was silent, it then provided that Richard shall be the governing trustee in the event of the death of Cheng Poon and that Howard shall be the governing trustee in the event of the death of Richard.

B The 1992 US will made three major changes to the 1990 US will; (i) whereas Cheng Poon (governing trustee), Cheng Bok, Richard and Teik Lim were the trustees, it then appointed Cheng Poon (governing trustee), Cheng Bok, Richard and Howard as the trustees, (ii) whereas it was silent, it then provided that Richard shall be the governing trustee in the event of the death of Cheng Poon and that Howard shall be the C governing trustee in the event of the death of Richard, and, (iii) Cheng Poon's beneficial interests was increased from ⅓ to 40%, whilst Cheng Bok and Cheng Liat's respective interest was reduced to 30% from ⅓.

The 1992 Malaysian will made seven major changes to the 1990 Malaysian will; (i) whereas Cheng Poon (governing trustee), Cheng Bok, D Richard and Teik Lim were the trustees, it then appointed Cheng Poon (governing trustee), Cheng Bok, Richard and Howard as the trustees, (ii) whereas it was silent, it provided that Richard shall be the governing trustee in the event of the death of Cheng Poon and that Howard shall be the governing trustee in the event of the death of Richard, (iii) with regard to Khaw Bian Cheng Sdn Bhd, the beneficial interests of Cheng Poon was E increased from 15% to 16%, of Richard from 3% to 6%, of Howard from 3% to 6% whilst the beneficial interests of Cheng Liat was reduced from 15% to 14% and of Teik Hock/Teik Gim from 4% to 1%, (iv) whereas it provided that Pykett Avenue could not be sold within five years from the date of death of the deceased, it was then silent, (v) whereas it provided F that Pykett Avenue shall be maintained for five years, it was then silent, (vi) Cheng Poon's beneficial interest was increased from 30% to 40% whilst Cheng Liat's ⅓ beneficial interest was reduced to a 30% life interest which the trustees 'shall be at liberty to dispose of the said 30% in any manner as they deem fit', and, (vii) Cheng Poon's interests to the residue of the estate was increased from ⅓ to 40% whilst Cheng Bok's interest was G reduced from ⅓ to 30% and whilst Cheng Liat's ⅓ beneficial interest in the residue of the estate was reduced to a 30% life interest which the trustees 'shall be at liberty to dispose of the said 30% in any manner as they deem fit'.

With respect to Mr Koh who contended that there was not much H difference between the 1990 and 1992 wills, even Howard could see that the impact of the 1992 wills was immense. Both the 1990 and 1992 wills had Cheng Poon as the governing trustee. The 1990 wills provided 'that all decisions of the trustees shall be with the written consent of at least three trustees one of whom shall be Cheng Poon'. It means that any decision of the trustees must have the written consent of Cheng Poon. But I Cheng Poon even as governing trustee and with Richard's support would not control the estate, as all 'decisions shall be with the consent of at least three trustees'. Likewise, Cheng Bok and Teik Lim would not control the estate. Therefore, under the 1990 wills, there was a fine balance between

Cheng Bok and Cheng Poon, even though Cheng Poon who could not be outvoted by the other trustees had a personal edge.

Clauses 5, 6 and 7 of the 1990 Malaysian will read as follows:

5 Notwithstanding cl 4 of this my said will, I hereby direct that my shares in Khaw Bian Cheng Sdn Bhd shall not be transferred to the beneficiaries referred to in cl 4 until after five (5) years of my death and in the meantime such shares shall be registered in the names of my trustees who shall hold the shares upon trust to transfer them to my said beneficiaries after five years of my death provided that:

(a) after my death and for the period of five (5) years of my death my trustees shall not dispose of or otherwise deal with the fixed asset of Khaw Bian Cheng Sdn Bhd. held in the property known as Lot 951, TS 13, Georgetown, North East District, Penang together with the building erected thereon bearing assessment No 20, Pykett Avenue, 10400 Penang;

(b) after my death and for the period of five (5) years of my death my trustees shall have the right to dispose of or otherwise deal with any other asset or property of Khaw Bian Cheng Sdn Bhd if such a disposal or dealing is in their opinion beneficial to the interests of my said beneficiaries referred to in cl 4 of this my said will and or for the purpose of paying for the expenses, taxes and other charges incurred or payable by the said company;

(c) in the event after my death and for the period of five (5) years there is insufficient funds in Khaw Bian Cheng Sdn Bhd to pay for expenses, taxes and other charges incurred and payable by the said company, I authorize my trustees to borrow funds from the general income of my estate in order to loan the same to the company to enable the company to pay its dues without fail.

6 After my death and for the period of five (5) years of my death my trustees shall continue to maintain in good state of repair my house at No 20, Pykett Avenue, 10400 Penang. My trustees shall continue to employ the staff of my said house such as the cook, the servant, the clerk, the gardener, the guard and the driver and my trustees shall continue to pay their salary and benefit-in-kind at the same rate and amount as they were receiving immediately prior to my death. I authorize my trustees to utilise funds from the general income of my estate in order to pay for the maintenance of my said house and its yard in good state of repair and to pay the salaries and benefit-in-kind of the house staff as well as for other miscellaneous expenses payable and incurred in respect of my said house.

7 After my death and for the period of five (5) years of my death at least one of my trustees shall take up full-time residence in my house at No 20, Pykett Avenue, 10400 Penang in the capacity of caretaker. The trustee who resides in the said house shall vacate the residence if there is an offer to purchase my said house and property after the period of five (5) years. The said trustee residing in my said house shall forthwith surrender and deliver vacant possession of my said house to the Trustees.

However, under the 1992 wills, 'all decisions shall be with the written consent of all trustees (or a majority) of the trustees'.

Clauses 5, 6 and 7 of the 1992 Malaysian will read as follows.

5 Notwithstanding cl 4 of this my said will, I hereby direct that my shares in Khaw Bian Cheng Sdn Bhd shall not be transferred to the beneficiaries referred to in the said cl 4 until after thirty (30) years of my death and in the meantime such shares shall be registered in the names of my trustees who shall hold the shares upon trust to transfer them to my said beneficiaries after thirty (30) years of my death, provided that:

(a) after my death my trustees shall have the right to dispose of or otherwise deal with any asset or property of Khaw Bian Cheng Sdn Bhd if such disposal or dealing is in their opinion beneficial to the interest of my said beneficiaries referred to in cl 4 of this my said will and/or for the purpose of paying for The expenses, taxes and other charges incurred or payable by the said company;

(b) in the event after my death and for the period of thirty (30) years of my death there is insufficient funds in Khaw Bian Cheng Sdn Bhd to pay for expenses, taxes and other charges incurred and payable by the said company, I authorize my trustees to borrow funds from the general income of my estate in order to loan the same to the company to pay its dues without fail.

6 After my death my trustees shall continue to maintain in good state of repair my house at No 20, Pykett Avenue, 10400 Penang. My trustees as they see fit shall continue to employ the staff of my said house such as the cook, the servant, the clerk, the gardener, the guard and the driver and my trustees shall continue to pay their salary and benefit-in-kind at the same rate and amount as they were receiving immediately prior to my death. I authorize my trustees to utilise funds form the general income of my estate in order to pay for the maintenance of my said house and its yard in good state of repair and to pay the salaries and benefit-in-kind of the house staff as well as for other miscellaneous expenses payable and incurred in respect of my said house.

7 After my death at least one of my trustees shall take up full-time residence in my house at No 20, Pykett Avenue, 10400 Penang in the capacity of caretaker. The trustee who resides in the said house shall vacate the residence if there is an offer to purchase my said house and property. The said trustee residing in my said house shall forthwith surrender and deliver vacant possession of my said house to the trustees.

Since three of the four trustees were Cheng Poon and his sons, it means that Cheng Poon and his sons would control the estate in Malaysia, Thailand and the US whilst Cheng Bok, who would always be outvoted, should it come to that, would be making up the numbers. Cheng Bok would be a frigid trustee. Real control would vest with Cheng Poon and his sons. The delicate balance so astutely formulated under the 1990 wills was totally discarded.

Also, under the 1990 Malaysian will, and for a period of five years, (i) the trustees could not sell Pykett Avenue or any other property of Khaw Bian Cheng Sdn Bhd [see 5(a) and 5(b)], (ii) Khaw Bian Cheng Sdn Bhd, a company without business and merely holding Pykett Avenue would be financially supported by the estate [see 5(c)], (iii) Pykett Avenue with the estate's support would be maintained in a good state of repair (see 6),

(iv) the employees of the deceased would be retained (see 6), and (v) one trustee at least would reside at Pykett Avenue. Reading cll 5, 6 and 7 of the 1990 Malaysian will as a whole, and all three clauses were geared towards the period five years after the death of the deceased, the deceased clearly intended that Pykett Avenue shall be retained for five years after his death. During those five years, Pykett Avenue could not be sold whilst the shares of Khaw Bian Cheng Sdn Bhd could not be distributed; reasonably, at the end of five years and because Pykett Avenue could not be sold, the beneficiaries of Khaw Bian Cheng Sdn Bhd would be transferred shares of a company with a valuable asset — Pykett Avenue. Clearly, all those three clauses were designed to retain and maintain Pykett Avenue until the appointed date (five years), so that the shares to be transferred to the beneficiaries on the appointed date would enjoy the intrinsic value of Pykett Avenue.

However, under the 1992 Malaysian will, and because cl 5(a) of the 1990 Malaysian will was discarded, the sale of Pykett Avenue could be effected even prior to the appointed date (30 years) for the transfer of the shares to the beneficiaries. Indeed, cl 5(a) of the 1992 Malaysian will expressly provided that the trustees 'shall have the right to dispose of or otherwise deal with any asset or property of Khaw Bian Cheng Sdn Bhd'. There arose the incongruity between cll 5, 6 and 7 of the 1992 Malaysian will.

Clause 5(a) of the 1992 Malaysian will provided that the shares of Khaw Bian Cheng Sdn Bhd, 'shall not be transferred to the beneficiaries ... until after thirty (30) years of (the) death of the deceased' and that 'in the meantime such shares shall be registered in the names of the trustees'. Since there was no restriction on the sale of Pykett Avenue, then there was no reason, unlike the 1990 Malaysian will, to prohibit the transfer of the shares for 30 years. Alternatively, since Pykett Avenue could be sold at any given time, it was only reasonable, was it not, so that the beneficiaries would enjoy the intrinsic value of Pykett Avenue, that the transfer of the shares should be effected immediately upon the sale of Pykett Avenue and not some 30 years after the death of the deceased. Moreover, since Pykett Avenue could be sold at any given time, there was reason only to support Khaw Bian Cheng Sdn Bhd. until the sale of Pykett Avenue and not for 30 years. The intent of cl 5(c) of the 1990 Malaysian will [cl 5(b) of the 1992 Malaysian will is in similar terms], reading cll 5, 6 and 7 of the 1990 Malaysian will as a whole, was to maintain Pykett Avenue until the distribution of the shares of Khaw Bian Cheng Sdn Bhd. Reasonably, there was no reason, in the absence of a restriction in the 1992 Malaysian will on the sale of Pykett Avenue for 30 years, to support Khaw Bian Cheng Sdn Bhd for 30 years.

But things do not exist in vacuum. As said, under the 1992 wills, Cheng Poon and his sons would control the Malaysian, Thai and US estates. Clause 5 of the 1992 Malaysian will provided that the shares of Khaw Bian Cheng Sdn Bhd until transfer to the beneficiaries shall be registered in the names of the trustees. It means that Cheng Poon and his sons would also control Khaw Bian Cheng Sdn Bhd until the year 2023.

Clause 5(b) of the 1992 Malaysian will authorized the trustees 'in the event ... and for the period of thirty (30) years ... there is insufficient funds in Khaw Bian Cheng Sdn Bhd to pay for the expenses, taxes and other charges incurred and payable by the said company' to borrow funds from the general income of the estate and 'loan the same to the company to pay its dues without fail'. Clause 6 of the 1992 Malaysian will authorized the trustees to borrow from the general income of the estate 'to pay for the maintenance of (Pykett Avenue) and its yard in good state of repair and to pay the salaries and benefit-in-kind of the house staff as well as for other miscellaneous expenses payable and incurred in respect of (Pykett Avenue)'. Unlike the 1990 Malaysian will, there was no specified period in the 1992 Malaysian will for the maintenance of Pykett Avenue and for the retention of the staff of Pykett Avenue. Clause 7 of the 1992 Malaysian will provided that 'at least one of the trustees shall take up full-time residence at Pykett Avenue in the capacity of caretaker' and that that trustee 'shall vacate Pykett Avenue if there is an offer to purchase Pykett Avenue'. Unlike the 1990 Malaysian will, the 1992 Malaysian will did not specify the period of residence of the trustee at Pykett Avenue.

It all means that Cheng Poon and his sons, in total control of the estate and Khaw Bian Cheng Sdn Bhd could: (i) sell Pykett Avenue as and when they dictate, or, (ii) reside at Pykett Avenue — with the house and retinue of attendants maintained at the costs of the estate — until the year 2023. In the case of the sale of Pykett Avenue, they would control the sales proceeds until 2023, or, in the event that Pykett Avenue is not sold, then for a period of 30 years, they could 'utilise funds from the general income of (the) estate ... to pay for the maintenance of (the) house and its yard in good state of repair and ... the salaries and benefit-in-kind of the house staff as well as for other miscellaneous expenses payable and incurred in respect of the said house' (see cl 6). Either case, by the year 2023, considering what Cheng Poon and his sons could pull off in the space of a few days in June 1992, would there be anything worth the while for any of the beneficiaries to have their shares in the company or would there be anything left in the estate after 30 years' borrowings from Khaw Bian Cheng Sdn Bhd? Well, probably not for Liang Imm, Cheng Bok and Cheng Liat who are in their sixties and would probably not be around in 2023. Probably, Cheng Poon would also not be around to account to the beneficiaries.

Clauses 5, 6 and 7 of the 1992 Malaysian will serve exclusively to benefit Cheng Poon and his two sons. In control of Khaw Bian Cheng Sdn Bhd, they could deal with the company and its assets (Pykett Avenue or the sale proceeds) as they please. They could 'borrow funds from the general income of (the) estate in order to loan the same to the company to pay its dues without fail' for 30 years. There is no restriction on the trustees borrowing from the estate, even after the sale of Pykett Avenue. For 30 years, the estate would have to sustain Khaw Bian Cheng Sdn Bhd. The company could drain, or could be the vehicle to drain the estate. But who would benefit? Cheng Poon and his sons occupy Pykett Avenue. Their stay at Pykett Avenue would be supported by the estate for 30 years.

Richard is the Managing Director of Khaw Bian Cheng Sdn Bhd, and he was taking a monthly salary of RM14,000 even though the company had no business and was merely holding Pykett Avenue and even though a salary of RM2,500 could not reasonably commensurate with the work and responsibility. The other beneficiaries of Khaw Ban Cheng Sdn Bhd, despite their overwhelming majority interest would be out in the cold. They would have to wait until the year 2023 for their shares. By then, Khaw Bian Cheng Sdn Bhd could have totally drained the estate of all assets and Khaw Bian Cheng Sdn Bhd could have nothing at all. And Richard's proclivity was not undocumented. By letter dated 28 December 1995 [PB3(1)], Richard as Managing Director of Khaw Bian Cheng Sdn Bhd. applied to the receiver and manager for a RM190,000 advance. As a director of the Thai company, and there was no evidence that he was doing any real work, he was taking, and Richard admitted he was taking without lawful authority, a monthly salary of Baht40,000.

Without any restriction on the sale of Pykett Avenue, and because for 30 years the trustees could borrow from the estate [either under cll 5(b) or 6], cll 5, 6 and 7 of the 1992 Malaysian will could only benefit Cheng Poon and his two sons. Only they would be comfortably ensconced for the next 30 years which could probably be the rest of Cheng Poon's life. As said, the deceased cared for all his children. In 1989, when Cheng Liat complained about the inequity of the 1989 deed, the deceased consulted a number of solicitors and held a number of meetings to verify that complaint. The deceased was angry, when it was confirmed that Cheng Poon would control a number of his properties. Surely, the deceased would be angrier still if Cheng Poon and his sons would have absolute control of all his properties, and if Cheng Poon and his sons, meanwhile, would derive all benefit whilst the other beneficiaries would have to wait, perhaps for 30 years, for their beneficial interest or what would be left then to be distributed to them. When Cheng Bok, Cheng Poon and Cheng Liat pleaded to the deceased that they were in their sixties and that the retention of Pykett Avenue for 10 years would be too long, the deceased reduced it to 5 years, a fact confirmed by Nik Saghir and a fact reflected in the 1990 Malaysian will.

Then, how could it be that the 1992 Malaysianwill provided that the shares shall be transferred after 30 years, bypassing one generation (who amongst the Cheng generation would be alive in 2023?) and subjecting the next generation, save Richard and Howard, to a guessing game [because of cll 5(b) and 6] for 30 years. The deceased, if he was the author of the 1992 wills, would not have played such a diabolical trick on his beneficiaries.

Mr Koh submitted that the benefit to the person preparing the will is only a circumstance for some suspicion. 'Suspicion to invalidate a will must be that grave as to override all other evidence propounding the will,' he said. 'These are no facts to arouse any suspicion in this case.'

Except that Mr Koh totally forgot that the benefit to the person preparing the 1992 wills and to his nuclear family was so absolute and so complete, whilst the interests of the other beneficiaries were so subservient

to the dominion and authority of the person preparing the 1992 wills and to his nuclear family that it could not not be asked if the person preparing the 1992 wills was the author of the 1992 wills. Cheng Bok asked that of Cheng Poon. According to Cheng Bok, Cheng Poon said to him that his (Cheng Poon) sons forged the 1992 wills. Of course, what Cheng Bok testified what Cheng Poon said was not evidence that Richard and Howard forged or authored the 1992 wills. But what Cheng Bok testified that Cheng Poon said was evidence of what Cheng Bok heard from Cheng Poon, evidence of a statement that Cheng Poon sphinx-like throughout the trial did not deny. It could only be presumed that it could not be denied. Again strangely enough, the pleadings supported the case that Howard and or Richard could have authored the 1992 wills. Howard said that he followed the amendments of the deceased. Richard denied all knowledge of the preparation and or execution of the 1992 wills. Bok Eng said she had no knowledge that Howard was preparing the 1992 wills. However, that was not how they pleaded their case. Cheng Poon, Richard and Howard pleaded that the deceased having lost trust in the rest of his family only permitted them (and they meant themselves) and Bok Eng to be party in the preparation of the 1992 wills. That being their pleaded case, then Richard and Bok Eng's denials of knowledge of the preparation of the 1992 wills, since it was not pleaded and since it was a radical departure from their pleaded case, could not be considered. Rather, the evidence was that Bok Eng knew of the execution of the 1992 wills, as Beng Tatt testified that Bok Eng told him in the morning of 3 August 1992, that 'they have made arrangements for Lim and Dr Gafoor's presence in the house and that an appointment has been made with one Dr Tan'. And what part Cheng Poon, Richard and Bok Eng played in the preparation of the 1992 wills was not explained nor clarified.

A further circumstance for suspicion, grave suspicion, was the proximity between the stroke, the 24 July 1992 deeds, the two PAs to Cheng Poon, the transfer and the execution of the 1992 wills, and the trips to China and the US.

On 12 July 1992, the deceased suffered a stroke. On 17 July 1992, the deceased was discharged from the hospital. On 24 July 1992, the deceased executed the 24 July 1992 deeds in favour of Cheng Bok and Cheng Liat, and granted a limited PA to Cheng Poon. On 3 August 1992, the deceased 'executed' a general PA to Cheng Poon, 'executed' a transfer of the Teluk Bahang land to Cheng Poon, and 'executed' the 1992 wills. Therefore, just about two weeks after discharge from hospital, unholy haste some would say, the deceased executed' two 24 July 1992 deeds, two (2) Powers of Attorney and 1992 wills — seven instruments in all. Mr Koh contended that the deceased was settling his earthly affairs. That might have been if only the events of June 1992 could be disregard. However, and taking into account the events of June 1992 and the fact that the 1992 wills were altogether slanted towards Cheng Poon and his sons, the indelible impression was that all was done double time to seize control of the estate before the impending death of the deceased, a death forewarned by the stroke, rather than that the deceased was hurriedly settling his earthly

affairs. Was it not obvious that the two PAs gave Cheng Poon all control whilst the deceased, struck down by further strokes or not, was alive and that the 1992 wills would give Cheng Poon and his sons all control if the deceased was dead? It was (almost), some would say, a master stroke.

A further unsettling fact was the trips to China and the US. The deceased was 87, well passed the average age, when he suffered a stroke. Surely, rest would have been the prescription. Yet, soon after the stroke but after the execution of the 1992 wills and the two PAs, Cheng Poon, and Bok Eng took the deceased on two long trips to China and to Taiwan and the US, as if those long excursions would not further weaken the deceased, and or, as if the deceased, since they were already in control, would not die fast enough.

There might have been another reason. Cheng Bok testified that he was informed each time he telephoned Pykett Avenue that the deceased was holidaying in Kuala Lumpur, and that Beng Tatt and Say Bee told him that Cheng Poon had instructed them not to inform him that the deceased was in Singapore. Hamid testified that two days before the deceased passed away he telephoned Pykett Avenue and he heard Bok Eng's voice in the background telling Cheng Poon not to inform him (Hamid) of the whereabouts of the deceased. All other children were not informed that the deceased was hospitalised in Singapore. Only when the deceased was in a coma in the intensive care unit, did Cheng Bok get to know of his father's condition. The other children got to know of their father's death.

Bok Eng testified that the deceased did not want to see the other children. Perhaps, the deceased was unhappy with Cheng Liat and or Cheng Hum. Perhaps, as Richard related, the deceased was unhappy with Cheng Bok who was always asking for money — Richard forgot that his family took almost all his money and the deceased, following his reasoning, would have been much more unhappy with his family. But why would the deceased at death's door not want to see Liang Imm, his only surviving daughter who visited him regularly, who never burdened him financially and who apparently held his affection? — in both 1990 and 1992 wills the deceased provided Liang Imm a greater beneficial share in Khaw Bian Cheng Sdn Bhd than the other children (including Cheng Poon) and grandchidren. And what plausible reason was there to explain why the deceased would not want to see the grandchildren he supported through the years for the last time? Bok Eng's explanation was just not plausible. She was also contradicted by Yeoh Keat Chye (DW2), a witness summoned by her family, who testified:

> He spoke when he left for Singapore. The deceased told me that if anyone would look for him to tell them that he is in Singapore receiving treatment.

The following exchange is also pertinent:

> Mr Khoo: Hamid Merican testified ... about two days before the deceased passed away, he called No 20 Pykett Avenue over the phone, he heard your voice instructing the person receiving his telephone call not to tell where the deceased was. Do you agree?
>
> Bok Eng Maybe I said so, maybe I did not.

It was a smug and haughty reply that did not erase but decidedly reinforced suspicion that the other children were kept away from the deceased. And Bok Eng would not have known of the last wishes of the deceased in the last days of his life, as she and Cheng Poon were in Penang (from 4 April 1993 to 9 April 1993) and with Cheng Poon busily cleaning out the last sen from the deceased's banking account. And now the two trips arranged by Cheng Poon to China and to the US (Beng Tatt's testimony that Cheng Poon arranged those trips was not challenged), within August 1992 to November 1992, could fit into a scheme of things. Consider the following. With the deceased in China and the US, the other siblings would not be able to reach the deceased, would not learn of the 1992 wills and therefore could not lodge any protest (as was the case of the 1989 deed) against the 1992 wills. As it was, the 1992 wills were not disclosed to the other children until after the death of the deceased. From March 1993, unbeknown to his other children, the deceased was hospitalised and there remained for six weeks until the day he died. Therefore, for a substantial period between 3 August 1992 until 10 April 1993 (the day the deceased died), the deceased was persona *non communicado*, a circumstance that did the 1992 wills no harm and suited the interests of Cheng Poon and his sons as well.

Sim Bee had one son — Joo Chie. Joo Chie had one son — the deceased. It would appear, if the alleged gifts and 1992 wills were transactions of good faith, that the deceased had only one son — Cheng Poon — and three lesser sons. But the deceased had not forgotten that he had more than one son, for even as he was dying and although his sons were not visiting him at Mount Elizabeth Hospital, he confided to Say Bee — his loyal servant of 50 years who remained steadfastly by his side throughout his stay at Mount Elizabeth Hospital — that the Teluk Bahang land was for Cheng Bok, Cheng Poon and Cheng Liat. Quite clearly, the deceased had not forgotten his other sons. He would not have abdicated all to one son.

The 1992 wills have the following untypical features. In each case, the attestation clause is the only text on a fresh page. That would have been handy in the reconstruction of the wills. The page with the attestation clause, in both the 1992 Thai and US wills, was not paginated. That should not be if the page with the attestation clause was printed after the preceding pages (Howard testified that he used Wordstar — a computer software this court is familiar with — in the preparation of the 1992 wills). In the case of the 1992 Thai will, none of the 6 pages in the first Schedule listing the Thai properties were paginated. Again, unless intentionally suppressed, the pagination of Those 6pp would have been automatically printed if those 6pp were printed after the preceding pages. In the case 1992 Thai will, cl 2 begins in p 2 and although there is sufficient space in p 1 to accommodate cl 2 (for a comparison, see second Thai will). If cl 2 is on p 1, then p 8 will have space to accommodate the attestation clause (for comparison, see second Thai will). Those features that dismembered the structure of the 1992 Thai and US wills are not inconsistent with a reconstruction. That is not to say though that there could not have been a legitimate explanation. It was just that nothing was explained.

The plaintiffs alleged that the 1992 wills were reconstructed. Howard did not give an explanation for the untypical and therefore questionable features of the 1992 wills he prepared.

Fraud was alleged, but there was no conclusive evidence, even if the 1992 wills were read over to the deceased, that the deceased knew and approved of the contents of the 1992 wills [*Guardhouse v Blackburn*; *Atter v Atkinson*]. Any presumption that the deceased knew and approved of the contents of the 1992 wills, assuming that the 1992 wills were read to the deceased or because there was a proper attestation clause, had been rebutted [*Garnett-Botfield v Garnett-Botfield*] by the clearest of evidence [*Gregson v Taylor*].

There was strong and unremittingly suspicion that the deceased was deceived into making the 1992 wills by fraud (in the civil sense) or was constrained to make it by undue influence. Contrary to Mr Koh's contention, the changes to the 1990 wills were not consistent with the changes related on 3 August 1992 to Dr Tan who testified that the deceased only informed him of the change of trustees. The fact that the deceased had no independent advice, legal or otherwise, and that his other children were kept away was not satisfactorily explained. The radical departure from the 1990 wills, radical because all changes solely favoured the nuclear family of the person who prepared the 1992 wills which obviously possessed great influence with the deceased, was not explained. The strong suspicion that the radical changes were not the result of the free volition of the deceased [*Marsh v Tyrrell*] was not removed.

Even if there was no direct evidence of undue influence, there was more than ample evidence that the deceased was so far under the influence of Cheng Poon and his family that a conclusion is warranted that undue influence was exercised in relation to the 1992 wills [*Boyse v Rossborough*]. The circumstances attending the execution were consistent with its having been procured by undue influence. The circumstances were not consistent with any other hypothesis [*Boyse v Rossborough*]. The proponents of the 1992 wills failed to show the righteousness of the transaction or that the 1992 wills expressed the true will of the deceased [*Finny v Govett*]. All said, the circumstances attending the execution were that suspicious that even if undue influence was not proved, but it was, the court is not satisfied as to the righteousness of the transaction [*Barry v Butlin; Fulton v Andrew; Re Hartley, Hartley v Fuld (Fuld intervening) (No 3)*]. Howard who prepared the wills under which he and his family took their extraordinary bounty and assumed all power failed to substantiate the truth, honesty and righteousness of the 1992 wills [*Fulton v Andrew*]. Howard failed to give clear proof that the deceased knew and approved of that part under which he and his family took their extraordinary benefits [*Hegarty v King*]. 'This means that ... the issue (substantial validity) must be found against (Cheng Poon, Richard and Howard)' [*Barry v Butlin*]. The 1992 wills purporting to be executed by the deceased have no validity whatsoever and cannot be admitted to probate.

The incredulous contention that the deceased was not senile and that therefore the gifts and 1992 wills were transactions of good faith, as if a

non senile person could not be coerced or influenced, could not be accepted. It was so very clear, that Cheng Poon, Richard and Howard, by the device of the so-called gifts and 1992 wills, were salting away and securing their own nest in preparation of the impending death of the deceased.

The substantial validity of the 1990 wills

All parties agreed that the deceased executed the 1990 wills in the presence of Hamid and Ghazi Ishak, the attesting witnesses, on 24 October 1990. Only Cheng Hum and Grace disputed the substantial validity of the 1990 wills.

The plaintiffs who put forward the 1990 wills as the true last will of the deceased had to establish that the deceased knew and approved of its contents at the time when he executed it [*Barry v Butlin* (1838) 2 Moo PC 480; *Guardhouse v Blackburn*]. That they attempted to establish by proof of testamentary capacity (the evidence of Hamid, Ghazi Ishak, Say Bee, Beng Tatt, Dr Gafoor, Dr Tan and his five certificates) and due execution (the evidence of the two attesting witnesses) from which knowledge and approval by the deceased of the contents of the 1990 wills could be assumed [*Barry v Butlin*].

Cheng Hum and Grace contended that the deceased did not know nor approve of the contents of the 1990 wills. Mr Yeoh submitted that the certificates of Dr Tan could not be relied on, that the 1990 wills were not read to the deceased or brought to his knowledge in some other way and that the deceased was constrained by undue influence.

The witnesses who testified on the circumstances attending the preparation and execution of the 1990 wills were Hamid and Ghazi Ishak. The witness who specifically testified on testamentary capacity was Dr Tan. However, there was no direct evidence that the deceased lacked the testamentary capacity when he executed the 1990 wills. Ruefully, the case of intestacy was particularly plagued by a paucity of evidence.

Unquestionably, the plaintiffs must satisfy the court that the deceased was of sound disposing mind when he executed the 1990 wills. But sanity is presumed until the contrary is shown [*Burrows v Burrows*] and where the will is rational on the face of it and is shown to be duly executed and if no other evidence is offered, the court will pronounce for it presuming that the testator was mentally competent [*Symes v Green*; *Sutton v Sadler*]. Therefore, Dr Tan's certificates deposing to the sound disposing mind of the deceased only augmented the presumption of sanity and mental capacity of the deceased. It was the icing on the plaintiffs' cake. The absence of Dr Tan's certificates could not rebut the presumption of sanity and mental capacity of the deceased when he executed the 1990 wills. For, to rebut the presumption of sanity, there must be proof to the contrary, on the balance of probabilities. Cheng Hum and Grace who alleged unsoundness of mind had to prove it [*Dew v Clark and Clark*; *Wheeler and Batsford v Alderson*], and they failed to adduce any proof. Instead, they relied on their learned counsel's powers of persuasion.

Mr Yeoh portrayed Hamid as a *bete noire*. He lambasted Dr Tan and his certificates. But he did not quarrel, and the others did not, with the testimony of Nik Saghir and Ghazi Ishak. According to Nik Saghir, in 1989 and in 1990, the deceased consulted him on his wills, and that he (Nik Saghir) advised the codicil executed at E & O Hotel Penang in March 1990. Nik Saghir also testified that the deceased enquired in June 1992 about the completion of the sale of the Teluk Bahang land. Ghazi Ishak testified that he had a conversation with the deceased on 24 October 1990 and that the deceased spoke in his usual manner. Clearly, the evidence of two impeccable witnesses supported the case on the sound disposing mind of the deceased.

Say Bee and Beng Tatt were also witnesses of truth. Mr Yeoh who did not quarrel with their testimony only found issue with Say Bee with regard to his evidence that the deceased was senile at about the end of 1991 but not at about the time of the execution of the 1990 wills as could suit the case that the deceased died intestate. Mr Yeoh also did not challenge Beng Tatt who testified — 'I believe ... from February 1992 the deceased was not aware of what he was paying out ... mostly he would stare at me' — that the memory of the deceased was only bad in 1992.

In their respective submissions, both Mr Koh and Mr Foo attacked the credibility of Say Bee and Beng Tatt and questioned their entire testimony. They submitted that the certificates of Dr Tan refuted senility and that therefore Say Bee and Beng Tatt who testified affirmatively on senility were not reliable witnesses whose entire testimony could not be relied on.

Apparently, Mr Yeoh, Mr Koh and Mr Foo all seemed to have equated senility with testamentary incapacity. But senility is infirmity resulting from deterioration of mind and body experienced in old age (*Black's Law Dictionary* (6th Ed)) while testamentary incapacity is something else altogether. A testator may not possess those qualities of the mind in the highest or in his former degree. His mind may be debilitated and his memory may be enfeebled. But yet, there may be enough left to discern and to judge of all things and all those circumstances which enter into the nature of rational, fair and just testament. It is only when 'they have so far failed as that these cannot be discerned and judged of, (that) he cannot be said to be of sound disposing mind and memory' [*Den v Vancleve*]. It means that senility, a (common) cause of mental impairment, cannot be automatically equated with testamentary incapacity.

In the instant case, there was no evidence that the infirmity of mind and body experienced by the deceased, although some degree of senility given his age could not be denied, had perverted his sense of right, prevented the exercise of his natural faculties or so deluded his mind when he executed the 1990 wills that if he was of sound mind he would not have made it. There was no evidence that the feebleness of mind and body incidental to old age and poor health had so impaired the intellectual faculties of the deceased that he lacked the testamentary capacity to contract on 24 October 1990. Say Bee and Beng Tatt's testimony that the

A deceased was senile from 1992, or for that matter from 1990, was not the cogent evidence of testamentary incapacity.

Dr Tan's five certificates deposed that the deceased, on the five occasions that he examined him, was of sound disposing mind. But Dr Tan's certificates did not depose that the deceased was not suffering from any B infirmity resulting from deterioration of mind and body experienced in old age. Accordingly, Dr Tan's certificates did not disprove Say Bee and Beng Tatt's testimony that the deceased was senile. Say Bee and Beng Tatt did not depose that the deceased lacked the testamentary capacity. There was no contradiction between Dr Tan's certificates deposing to sound disposing mind and Say Bee/Beng Tatt's testimony that the deceased was senile.

C Richard produced receipts showing that he was in Kuala Lumpur on 3 August 1992. Mr Koh contended that Beng Tatt who testified that Richard was in Pykett Avenue on 3 August 1992 at about the time of the execution of the 1992 wills was therefore not a reliable witness. Maybe, Beng Tatt was wrong with regard to that (minor) aspect of his testimony. D Nevertheless, Beng Tatt was right on the dot with regard to the rest of his testimony and on all critical issues. He was dead on about the 1989 deed, about the meeting at E & O Hotel, about Howard bringing out documents for signature on 3 August 1992, Lim taking possession of the documents signed on 3 August 1992, Lim handing him documents after 3 August 1992 for the signatures of the deceased and Dr Gafoor, the execution after E 3 August 1992 of documents relating to wills by the deceased and Dr Gafoor, the execution after 3 August 1992 of documents relating to wills without the joint presence of the attesting witnesses, all large payments to Cheng Poon and his family, the Malaysian accounts of the deceased, about Glashaus Sdn Bhd, the instructions of Khaw Bian Cheng Sdn Bhd F to Tan Chiew Hun to secure a purchaser for Pykett Avenue at the price of RM16,215,760, the RM866,000 promised to three sons, the interests paid to Cheng Bok and Cheng Liat, the redemption of the Teluk Bahang land, the monthly maintenance to the sons and grandchildren, the termination of the monthly maintenance to Cheng Hum, Cheng Bok and Cheng Liat, Cheng Liat being barred from Pykett Avenue, about the RM140,000 G taken by Cheng Poon, the offer for the Benson land, and practically about everything else. Given that preponderant accuracy in his testimony, Beng Tatt could only come across as a reliable witness, even though he could have been wrong about Richard being in Pykett Avenue on 3 August 1992. After all, one swallow does not make a summer. And surely, Beng Tatt, as H is the case of any witness, was not expected to give perfect evidence.

Both Say Bee and Beng Tatt were exhaustively examined. Both emerged with their credibility intact. In any event, why would they not speak as a matter of factly? Howard accused Say Bee and Beng Tatt of having been suborned by his uncles. But both deserved better. Say Bee had served the deceased for 50 years. That was not the hallmark of a man of fleeting I loyalties and shifting allegiance. All day and night, Say Bee cared for the deceased at LWE Hospital and Mount Elizabeth Hospital. That was devotion beyond the call of duty. Beng Tatt was also a trusted employee

of long standing. Reasonably, both would not betray the memory of the man they gave yeoman service. And anyway, Cheng Bok who had no money for his (third) marriage and Cheng Liat who was an undischarged bankrupt from 1990 to 1997 would not have had the money to buy witnesses. Even Howard who said that Cheng Bok and Cheng Liat did not have the money to help pay the taxes of the US estate recognized that his uncles were not financially sound. In contradistinction, Cheng Poon and his family were Mr Moneybags. Surely, if Say Bee and/or Beng Tatt would sell their soul for gold, it would have been logical for them to be on Cheng Poon's side. Cheng Poon was near and Cheng Poon and his family were already in de facto control of the estate. After all, Cheng Bok and Cheng Liat at best could only promise while Cheng Poon could be much more tangible. It was not unnoticed that Say Bee and Beng Tatt remained in court, quite unlike witnesses who had perjured and would have made themselves scarce, throughout the rest of the proceedings as if in vigil. Nay, Say Bee and Beng Tatt were just two respectable and credible witnesses. There was no reason for them to take sides. As Beng Tatt tersely answered Mr Koh who suggested that he (Beng Tatt) had prepared himself to lie in court: 'Personally, I have nothing against the first to third defendants. They have treated me well. Richard has also invited me to work for Khaw Bian Cheng Sdn Bhd. There is no reason for me to lie in court. I was summoned ... I am here to tell the truth.'

Likewise, Say Bee and Beng Tatt's testimony would only support the case of testamentary capacity. According to Say Bee, in 1991, the deceased was still replying his letters. However, by the end of that year (1991) the deceased was forgetful and could not express himself. From January 1992, the deceased was not registering the letters read to him nor instructing his replies, although sometimes he would ask what was read to him. Even on 3 August 1992, the deceased was able to understand questions put to him, as he said 'curry and bread', a totally judicious answer, when Say Bee asked what he wanted to eat. According to Beng Tatt, it was only from February 1992 that the deceased was not able understand the reason for the cheque he was signing; before that, the deceased would ask the reason for each payment. In 1990, the deceased was able to instruct Beng Tatt to prepare the letter barring Cheng Liat from Pykett Avenue — DB1(B)(9). In July 1992, the deceased was able to instruct Beng Tatt to pay interests to Cheng Bok and Cheng Liat and to pay RM40 for a Justice of the Peace tie he ordered.

Truly, not one of the witnesses supported testamentary incapacity. Dr Gafoor who said that the deceased was his patient between 1990 to 1992, testified that the deceased returned his greeting on 3 August 1992. He said that the deceased 'read the 1992 wills himself'. Dr Francis testified that the deceased after he regained consciousness appeared very alert and was able to talk on 13 July 1992. In the morning of 14 July 1992, the deceased was talking reasonably and lucidly. On 16 July 1992, the deceased who was rambling on 15 July 1992 was more his usual self and was showing interest by reading the newspapers. On 22 July 1992 and 27 July 1992, the deceased was clear and lucid. He was able to understand and answer Dr Francis.

Clearly, the evidence even without Hamid and Dr Tan was already overwhelmingly for sound disposing mind. But Hamid and Dr Tan's testimony could not not be believed. Perhaps Hamid was wrong about Ghazi Ishak reading the 1990 wills to the deceased on 24 October 1990. Otherwise, Hamid's testimony was totally substantiated. His account of the relationship between the deceased and his wife, the 1989 deed and the codicil, the meetings in Singapore, Kuala Lumpur and at E & O Hotel, Nik Saghir's advice, the 1990 wills, the deceased accusing Cheng Liat of poisoning him and then barring Cheng Liat from Pykett Avenue, his three visits to Pykett Avenue after July 1992, the sales proceeds payable to Cheng Bok, Cheng Poon and Cheng Liat from the sale of the Batu Ferringhi land, the RM866,000 paid to Cheng Poon and the interests paid to Cheng Bok and Cheng Liat, his telephone call to Pykett Avenue, the cars, the overdraft from the BBMB, Dr Tan's certification of sound disposing mind, the sale and aborted sale of the Ayer Itam lands and Cheng Hum's payments to Cheng Poon and Cheng Liat, the trip to London, his visit to the Benson land in Arizona, the offer from Tri-Am International Inc, and the mental stability of the deceased was corroborated by credible witnesses and or by established evidence. Never was Hamid discredited. There was no reason to disbelieve him. And according to Hamid, in June 1992 the deceased said to him that he (the deceased) had no money to pay 45% of the sales proceeds (Batu Ferringhi land) to his three sons and the deceased asked him (Hamid) to convey that to Cheng Bok and Cheng Liat. In July 1992, Hamid was with the deceased in Kuala Lumpur. That was clear evidence that the deceased had his faculties even in June 1992.

Mr Yeoh contended that the certificates deposing to the sound disposing mind of the deceased could not be relied on. He berated the good doctor for not recording his clinical findings. He contended that the medical certificates in the absence of the clinical findings had no probative value whatsoever. Thus far, Mr Yeoh was engaging in fair and legitimate criticism. Then astonishingly, Mr Yeoh contended that Dr Tan's testimony that the deceased informed him of the coming changes to his wills was a lie. He contended that the deceased never related the coming testamentary changes that Dr Tan recorded; those testamentary changes, he contended, were related by the persons who accompanied the deceased. With respect, Mr Yeoh had forgotten that it was not put to Dr Tan that the deceased never spoke of the testamentary changes that Dr Tan recorded or that Dr Tan's testimony was a lie; since Dr Tan's was not challenged, it was too late, at the stage of submissions, to put what was not challenged and therefore not in dispute into controversy. Accordingly, Dr Tan's testimony of his conversations with the deceased on all five occasions could not be denied. In any event, no interested third parties accompanied the deceased on 24 October 1990. Whatever recorded by Dr Tan Could only have been related by the deceased himself — according to Dr Tan, and it was adduced by Mr Yeoh, Lim who accompanied the deceased on 24 October 1990 remained silent throughout the medical examination. The contention that Cheng Poon or third parties related the coming testamentary changes that Dr Tan recorded and attributed to the deceased had no evidential basis whatsoever. There was not an iota of evidence for such a contention.

The absence of clinical findings was not in issue during the examination of the witness. But assuming it was, it did not put the certificates into doubt. After all, the certificates were not inconsistent with the established evidence. There was no reason to doubt the testimony of the witness. There was never any suspicion of testamentary incapacity. The deceased's desire for a penile prosthesis though lascivious was not abnormal. The occasional quirk was not insanity. Rather, in July 1992, the deceased even had the mental capacity to discuss the drug to be administered to Cheng Been. As Dr Tan said, '(the deceased) was talking normally, like a normal person'.

There was no evidential basis to accept the contention that the lacuna infarct (it was not in 1990), progressive intellectual loss, age and the medication over the years must have reduced the mental capacity of the deceased to the extent that the 1990 wills were not wills of the deceased. The disorientation and confused state was redressed in 1987. There was no evidence that the deceased was incapable of making a will in October 1990. The evidence of credible witnesses present when the deceased executed the 1990 wills and of Dr Tan (and they were not merely witnesses called into his presence for a few moments) were of considerable weight. The state of mind of the deceased, at the immediate time at which the 1990 wills were executed and at the intermediate stages of his life, was affirmatively sound and stable. There was no disorder of the mind that poisoned his affection, perverted his sense of right, or prevented the exercise of his natural faculties. The deceased was old, and his mind may be in some degree debilitated, and his memory might have become in some degree enfeebled; but there was more than enough to discern and discreetly to judge, of all things and all those circumstances which enter into the nature of rational, fair, and just testament.

Mr Yeoh beseeched the court to inquire if the certificates were orchestrated by those who would profit from those certificates and from the ensuing wills. Dr Tan testified that the deceased informed him on 23 October 1987 that he (the deceased) was afraid that his children would challenge his mental capacity and he (the deceased) wanted him (Dr Tan) to certify to his mental fitness. Dr Tan was not challenged. Then, it would appear that the deceased anticipated, even as early as 1987, that his children would challenge his mental capacity, and that the deceased had prepared himself and procured the medical certificates to foil his children who would challenge his mental capacity. And those certificates could not be disregarded, even though Dr Tan admitted that the mental condition of the deceased could fluctuate even on the day of the certificate, for it must be reasonably assumed, because there was no history of any psychotic intervals, that the mental capacity of the deceased, even though assuming that it could fluctuate on the day of the certificate, would not instantly plummet to total testamentary incapacity.

In summary, the evidence could only be synthesized into the one inescapable conclusion that the deceased had testamentary capacity. Cheng Hum's testimony on the health of the deceased — not good, suffering from depression, insomnia, palpitation of the stomach, Parkinson's disease,

heart problems and prostate cancer — was not the cogent evidence that the deceased lacked the testamentary capacity. Cheng Hum's testimony on the mental health of the deceased — 'starring blankly and not knowing what he was doing, 50% of the time, he was normal and 50% of the time he was abnormal, during lunch he ate quietly, after lunch, he would lie on the sofa without talking, the deceased could not understand the contents of the 1990 wills' — if it was Cheng Hum's proof of testamentary incapacity, was totally against the weight of the evidence. Despite whatever was submitted at length on the poor health, poor memory, senile dementia aggravated by the loss of wife, assorted ailments and heavy medication, it was ineluctable that the deceased had never lost his mental capacity. Witness after witness reinforced that fact that was only opposed by a bare assertion, from Cheng Hum.

Maybe Cheng Hum did have a point when he said that '(his) mother was like my father's walking stick (and) when she died in 1988, he collapsed,' ... and that the deceased thereafter was not his usual self but relied on Cheng Poon. The deceased did rely on Cheng Poon — Lim related that Cheng Poon consulted him several times on behalf of the deceased. But more importantly, with regard to the making of the 1990 wills, was there evidence of the 'undue influence constituted by Cheng Poon's influence, Hamid's influence and Cheng Bok/Cheng Liat's influence' that Mr Yeoh so vigorously canvassed? Was there evidence that 'undue influence was exercised in relation to the 1990 wills as to overpower the volition without convincing the judgment of the deceased? [*Hall v Hall*]. Was there evidence that the deceased was coerced into making the 1990 wills he did not desire? [*Wingrove v Wingrove*]. And if it was not shown that undue influence had been exercised to the 1990 wills, was it shown that the deceased was so far under the influence of the persons benefiting from the 1990 wills that he was not a free agent and that a conclusion therefore may be warranted that undue influence was exercised in relation to the 1990 wills? [*Boyse v Rossborough*]. Cheng Hum and Grace, the parties alleging undue influence in the making of the 1990 wills, must prove or show it. Unlike the 1992 wills, they were on their own. They could not just hope to ride on the evidence adduced by the plaintiffs.

The plaintiffs showed that none of the beneficiaries had a hand in the preparation of the 1990 wills. Cheng Bok and Cheng Liat testified that they did not know of the preparation and execution of the 1990 wills. They were not challenged. Hamid testified that the deceased was the only person who instructed him on the 1990 wills. Hamid was not challenged. And it was unchallenged evidence as well that Cheng Poon did not know of the 1990 wills until after the safe was opened.

What was the proof that Cheng Hum and Grace supplemented? Both the 1990 and 1992 wills only bequeathed token legacies to Cheng Hum. In both wills, Grace was not a beneficiary. Then, the 1990 or 1992 wills as the true last will of the deceased would leave them, and them alone, out in the cold. Reasonably and even understandably, neither the 1990 nor 1992 wills should interest Cheng Hum or Grace.

Cheng Hum pinned his misfortune and his spats with the deceased at Cheng Poon's door. The following was what Cheng Hum who considered himself the favourite son until the deceased was poisoned against him said. His relationship with his parents deteriorated after Cheng Poon's marriage in 1963. Cheng Poon was constantly insinuating to the deceased that he (Cheng Poon) was a more capable son. He did not rebut Cheng Poon, as his parents would only listen to Cheng Poon. His relationship with the deceased did not improve after 1990 It got a bit worse. It was all due to Cheng Poon's instigation and influence over the deceased. Cheng Poon was saying that he (Cheng Hum) had no son to carry on the family name. His relationship with his parents, up to 1988, did not improve. In 1988, at Cheng Poon's instigation, the deceased forced him to sell his Ayer Itam lands and to give RM130,000 to Cheng Liat and Cheng Poon. He could not refuse. At Cheng Poon's instigation, the deceased also forced him to sell three pieces of lands in Bukit Tengah, Butterworth. That sale was aborted. Because of Cheng Poon's influence, the deceased refused to help him refund the deposit. Sometime in 1990, Cheng Poon instigated the deceased to instruct him to sell the remaining Ayer Itam lands. He was similarly threatened that he would be disowned. That time, he refused as the price offered was half the market value. The deceased told him not to come to Pykett Avenue anymore. Thereafter, he stopped going to Pykett Avenue and stopped visiting the deceased. He wanted to continue his visits, but he was afraid that Cheng Poon would continue his instigations and he would be forced to sell his lands once more. After he stopped visiting Pykett Avenue, his monthly allowance was terminated at the instigation of Cheng Poon. He did not believe that his father had stopped his visits. He believed that Cheng Poon was behind those instructions. He had no knowledge of the 1990 and 1992 wills. He got to know of those wills after Cheng Bok filed these proceedings. He did not believe that his father would leave him RM20,000. The deceased, a kind and loving father, was not vindictive. The deceased would have been fair and would not leave him much less than his brothers. He believed, because of his experience with Cheng Poon, it was all due to Cheng Poon's instigation. The deceased depended on Hamid for advice on the sale of properties. Hamid was close to Cheng Poon and Cheng Liat. Hamid was close to the son who was having the upper hand. Cheng Liat held the upper for a short six months in 1990. Then, Hamid was closer to Cheng Liat than Cheng Poon. After that six months, Cheng Poon was on the ascendant. He knew nothing of his brothers' trip to Singapore in 1990 with the deceased. His brothers were arranging the distribution of his father's assets to his (Cheng Hum) detriment. It was a case of 'less man more share'. He could not agree with Cheng Bok's reasons for his exclusion from the 1990 wills. 'Cheng Bok gave those reasons with an ulterior purpose.' Only Cheng Poon could have instigated the deceased's letters claiming his properties. On his own, the deceased could not have authorized those letters. The deceased was not a man who would even attempt to take back what he had given. The deceased gave those properties to him. The deceased was a man of his word. Those letters were instigated by Cheng Poon to pressurise

him into concurring with the sale of the Ayer Itam land. Cheng Poon could influence the deceased. Cheng Poon even made decisions for the deceased. His brothers could get the upper hand more easily if they enlisted Hamid's help.

It was not undiscerned that Cheng Hum's testimony was more of a ventilation of his anger for his disadvantageous position than of any real complaint of any undue influence in the making of the 1990 wills. He blamed Cheng Poon for the deterioration beginning 1963 of his relationship with his father. He said that his relationship did not improve but rather got worse because of Cheng Poon's instigation and influence. He said that Cheng Poon was saying that he (Cheng Hum) had no son to carry on the family name. He said his relationship with his parents, up to 1988, did not improve. Next, he blamed Cheng Poon for the sale of his Ayer Itam lands, the RM130,000 paid to Cheng Liat and Cheng Poon, the sale of his lands in Bukit Tengah, Butterworth, the attempts to force him to sell his remaining Ayer Itam lands, the threats to disown him, the attempts to claim back the properties given him, the termination of his monthly allowance and the instruction barring him from Pykett Avenue. He said that his father would not leave him RM20,000 but would have been fair and not leave him much less than his brothers. He believed it was all due to Cheng Poon's instigation. Cheng Poon could influence the deceased and even made decisions for the deceased, he said. Blame was pinned all round. Surprisingly, Cheng Hum uttered not a word that the 1990 wills were procured by undue influence.

Mr Yeoh exhorted that Cheng Poon's influence over the deceased and the deceased's trust in Hamid were the principal reasons for the 1990 wills and that the 1990 wills were not wills of the deceased but were procured by the importunity of Cheng Poon and Hamid. He asserted that the deceased fell prey to Cheng Poon's manipulations after the death of Ooi Geen Peen.

The gravamen for that hypothesis was the alleged importunity of Cheng Poon and Hamid. As said, those alleging undue influence must prove it. But there was no evidence that undue influence had been exercised in relation to the 1990 wills. There was no evidence that the other brothers, either jointly and or severally, had obtained Hamid's help in procuring the 1990 wills. There was no evidence that importunity, be that of Cheng Poon and or Hamid, had been visited and or inflicted upon the deceased into making the 1990 wills, or that Cheng Poon was involved in the preparation of the 1990 wills. There was no evidence, and it was also not shown, that Cheng Poon's influence over his father had been exercised in relation to the 1990 wills. Hamid testified that only the deceased instructed him to prepare the 1990 wills and that none of the sons knew of the 1990 wills. Cheng Bok and Cheng Liat testified that they had no knowledge whatsoever of the preparation and execution of the 1990 wills. And there was no evidence that Cheng Poon and Hamid had banded together and exerted their respective influence on the deceased. True, Cheng Poon did

not refute Cheng Hum's allegations. Yet, all that could be reasonably inferred was that Cheng Hum's allegation that Cheng Poon was the cause of his rift with the deceased could not be denied. But that adverse inference, even meaning that Cheng Poon out-maneuvered Cheng Hum, could not extend, unrestrained, to an inference that the 1990 wills were not wills of the deceased.

In truth, all that Cheng Hum had related were circumstances — Cheng Poon's influence over the deceased, the deceased's trust in Hamid — that might not have served his interests. But that were not the only circumstances attending the execution of the 1990 wills. The entire circumstances attending the execution of the 1990 wills were not consistent with them having been procured by undue influence. Cheng Poon might have worked himself into a position of great influence. Cheng Poon, Cheng Bok and Cheng Liat might have agreed to an equal distribution of their father's estate. Yet, the pertinent issue was what the deceased intended and whether the 1990 wills expressed the mind of the deceased and not what the beneficiaries wished and even legitimately strived for.

Cheng Hum and Grace challenged the righteousness of the 1990 wills. Cheng Hum testified that the deceased would not only have left him RM20,000. However, Hamid testified that the deceased informed him that Cheng Hum was bypassed as he (the deceased) and Lim Swee Eam had given substantial properties to Cheng Hum and that Cheng Hum had no issue. Dr Tan testified that he asked of the deceased what would be given to Cheng Hum and that the deceased replied that Cheng Hum who had already inherited a lot of properties from Lim Swee Eam. Sadly for Cheng Hum, it would appear that the deceased had not forgotten Cheng Hum. He was just set on leaving his eldest son without issue out of his will to correct the imbalance he perceived. And the latter deduction was not inconsistent with Cheng Hum's admission that his relationship with the father deteriorated in 1963 and thereafter only got worse. That is not to say though that the 1990 wills would achieve parity amongst the sons. After all, as Mr Koh rightly submitted, the deceased was entitled to treat his children unequally. The deceased had a penchant for changing his wills. The numerous 'wills' prior to the 1990 wills attested to that predilection. Therefore, the execution of the 1990 wills, just seven months after the 1990 codicil, was not a departure from past predilection. The deceased had declared his intention to leave out Cheng Hum. Therefore, the token provisions to Cheng Hum did not arouse suspicion.

Mr Yeoh pointed out that the deceased did not personally instruct Ghazi Ishak to prepare the 1990 wilis and Ghazi Ishak did not explain the 1990 wills to the deceased and that there were differences in the testimony of Hamid and Ghazi Ishak — Hamid testify that Ghazi Ishak read and explained the 1990 wills to the deceased whilst Ghazi Ishak testified that he did not do so; Hamid testified that the deceased gave instructions to Ghazi Ishak prior to 24 October 1990 whilst Ghazi Ishak testified that he only saw the deceased on 24 October 1990. Nevertheless, the preparation

of the 1990 wills by a lay person and the difference in the testimony of Hamid and Ghazi Ishak did not compromise the integrity of the 1990 wills. It was unchallenged evidence that the deceased discussed the 1990 wills with Hamid on several occasions and that Ghazi asked the deceased to read the 1990 wills. It was unchallenged evidence as well that the deceased read through the 1990 wills before he set his hand. There was no evidence that the deceased was under the influence of the persons benefiting from his will or that he was not a free agent. Besides, there was no plausible reason for Hamid who was not shown to be tendentious to procure a will solely against Cheng Hum.

There were no circumstances attending or surrounding, or relevant to, the preparation and execution of the will itself that excited the court. Preparation of a will by a lay person is not a circumstance for suspicion. Why the deceased would pick a lay person to prepare his will after going through the trouble of getting a certificate could only be answered speculatively. The civil engineer who assisted Hamid was not a necessary witness to unfold the entire circumstances regarding the preparation and execution of the wills, and his absence from the witness-box was not material. The 1990 wills was a departure from the past only with regard to form — it was partitioned into three separate documents. With regard to substance, the 1990 wills was not a radical departure. Ghazi Ishak explained why he did not explain the 1990 wills to the deceased. The deceased who was fluent in the language of the document and had experience with formal deeds and instruments, must reasonably be assumed, when he set his hand, to have read and accepted the provisions of the 1990 wills. It could not be suspected, merely because the deceased did not question nor discuss the document, that he was not aware of the provisions of the 1990 wills, as he had discussed the draft wills and was priorly asked to read each page of the 1990 wills. Indeed, there was no doubt that the deceased had read through the documents. Whether it was read loudly or silently was not of any consequence in the circumstances of the case. There was no material evidence that mere reading, even given the (sketchy) medical history of the deceased, was not enough. Admittedly, there was some inconsistency between the evidence of Hamid and Ghazi Ishak. But even witnesses from the same side are not expected to give replica evidence, and the inconsistency in the instant case was not anything that material and that substantial as could cast doubt on knowledge of the document. There were no circumstances that rebutted the presumption of knowledge by execution.

With respect, all that was so assiduously submitted on Cheng Poon's manipulation and his so-called menacing influence, on the 1986, 1987 and 1989 wills, on the 1989 deed and 1990 codicil, on the meetings in Singapore, on the agreement of the brothers to exclude Cheng Hum, was irrelevant. For even if all that Mr Yeoh submitted were true, it was water under the bridge. If there were any undue influence, menacing influence or manipulation, it was purged by the 1990 wills — the 1990 wills was the

break from the past. The fact of the matter was that the 1990 wills were prepared and executed without the knowledge of the children. The fact that the 1990 wills were born quietly, without fanfare and without the knowledge of the beneficiaries and that therefore the deceased could not have been influenced by his beneficiaries only reinforced belief that the 1990 wills was the deed of the deceased. All that was said about the meetings in Singapore, if at all true, could only apply to the 1990 codicil. Undoubtedly, Cheng Poon had influence, even in 1990. But that solitary fact was too little for any inference or deduction that Cheng Poon had manipulated the deceased into making the 1990 wills, particularly as there was no evidence that connected Cheng Poon to the 1990 wills.

At any rate, the evidence was that the deceased intended the 1990 wills. Hamid testified that the deceased requested him to prepare the 1990 wills and that the deceased discussed the draft 1990 wills with him on many occasions. Dr Tan testified that the deceased informed of the coming testamentary changes on 24 October 1990. Later in the same day, the deceased attended before Ghazi Ishak and executed the 1990 wills. It was so very clear that the deceased knew and approved of the wills he was executing on 24 October 1990. That conclusion was irresistible and ineluctable.

The circumstances attending the execution of the 1990 wills, as far as could be judged, were not consistent with them having been procured by undue influence. The deceased was not deceived into making them by fraud or constrained to make them by force, threats or other forms of undue influence. The court is satisfied that there was no undue influence and that there were no circumstances that should excite its suspicion and vigilance. There was no question of fraud, and the fact that the 1990 wills were read by the capable the deceased was conclusive evidence that he knew and approved of the contents, and that presumption had not been rebutted.

All things considered, it must be deduced that the deceased understood and approved the provisions of the 1990 wills. The plaintiffs who propounded the 1990 wills had discharged the burden of showing the righteousness of the transaction and that the document propounded expressed the true last will of the deceased. 'This means that the issue must be found against (Cheng Hum and Grace)' [*Barry v Butlin*]. This means that the 1990 wills are the true last wills of the deceased and can be admitted to probate.

The removal of executors

Moving on, the next pressing issue is whether Cheng Poon and Richard, as the executors and trustees in the true last will of the deceased, should be removed as executors and trustees of the estate.

There is no power contained in the 1990 wills to remove any named executor and trustee. There is 'power to revoke a grant of probate or letters of administration ... by s 34 of the Probate and Administration Act 1959

... for any sufficient cause' [*Re Khoo Boo Gong decd; Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68, per Chang Min Tat FJ]. There is no definition of what is sufficient cause. However, at p 69, Chang Min Tat FJ expressed the view of the Federal Court that if in the words of Jeune, President, in *In the Goods of William Loveday* [1900] P 154 at p 156 'the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto', then the test of what is sufficient cause, and his Lordship added that it is strictly an objective test, is the due and proper administration of the estate and the interests of the beneficiaries.

Following Re *Khoo Boo Gong*, Haidar J (as he then was) enunciated, in *Jigarlal Kantilal Doshi & Ors v Damayanti Kantilal Doshi & Ors* [1995] 3 AMR 2590, that 'the court, in the exercise of its power under s 34 ... to dispossess a trustee or executor who is willing to act, will be induced to do so only when a strong case is made out [as it] is not for the court to say in whom the trust for the administration of the property shall be reposed'.

There is no direct statutory provision on the power of the court to *remove* a person named as executor in a will who is willing to act, before the grant of probate. There are only provisions on the *appointment* of new trustees either in substitution or in addition to existing trustees who are not willing to act or are unfit or incapable.

Section 40(1) of the Trustee Act 1949 empowers the *persons* specified in sub-ss (a) and (b) to 'appoint one or more other persons ... to be a trustee or trustees in the place of the trustee so the deceased, remaining out of Malaysia, desiring to be discharged, refusing, or unfit or being incapable, or being a minor', whilst s 45(1) of the Trustee Act 1949 empowers the court under the stated circumstances to 'make an order appointing a new trustee or new trustees [but not an executor or administrator — see s 45(3) of the Trustee Act 1949] either in substitution for or in addition to existing trustees, or although there is no existing trustee'.

In the Estate of Lum Yoon Kow decd, Lum Hor Choong v Hew Lye Heong & Lam Cheok Tong [1936] MLJ 136, in an application to remove a trustee and to appoint new trustees, Whitley J, observing that the appointment and removal of trustees were not specifically included amongst the matters which may be determined under s 68 of the Civil Procedure Code, held that the words 'the determination of any question arising in the administration of the estate or trust' comprised in the general cl (g) was wide enough to include the appointment and removal of trustees.

A similar judicial devise, the giving of a wide interpretation, was also employed in *Rachael Mei Ling Ong & Anor v Dato' Bruno Henry Almeida (as the executor for the estate of Ong Soon Hoe, deceased)* [1998] 6 MLJ 258, in an application to have the defendant removed and/or substituted as the executor/trustee before the grant of probate, where Kamalanathan Ratnam JC (as he then was) held that O 80 r 2(3)(e) of the Rules of the High Court 1980 is wide enough to give the court the general power to remove or substitute an executor or trustee from such capacity.

The closest direct provision on the power of the court to remove any person named as executor in any will before the grant of probate is s 40 of the Probate and Administration Act 1959 which reads:

> The Court shall have the power to summon any person named as executor in any will to prove or renounce probate of the will and do such other things concerning any will as the High Court in England could do.

The recourse in general to English Law is provided in s 3(1) of the Civil Law Act 1956 which reads:

> Save so far as other provisions has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

In England, courts undoubtedly have that jurisdiction to remove an executor or trustee before the grant of probate. In *Re Chetwynd's Settlement, Scarisbrick v Nevinson* [1902] 1 Ch 692, Farwell J held that in an action to administer a trust, the court has inherent jurisdiction to discharge a trustee whilst in *Re Bridgman* 29 LJ Ch 844, it was held that an application to remove a trustee on the ground of vexatious conduct must be made by bill. 'Where there is no dispute of fact, the court in the exercise of its statutory power to appoint new trustees (s 41 of the English Trustee Act 1925 which is in pari materia with s 45 of the Malaysian Trustee Act) may order the removal of a trustee against his will in proceedings begun by originating summons (*Re Henderson, Henderson v Henderson* [1940] Ch 764, 3 All ER 295; *Re A Solicitor* [1952] 1 All ER 133, where a solicitor was removed from the trusteeship of the clients' account). Where there is a dispute of fact, the proper course is to invoke the court's inherent jurisdiction over trustees in an action begun by writ ...' [48 *Halsbury's Law of England* (4th Ed) para 784].

That being the undoubted position, the local jurisdiction has similar inherent jurisdiction to remove a trustee.

Halsbury's Law of England (4th Ed) Vol 48 para 783 imparts the following commentary on the removal of a trustee by the court:

> The court will remove a trustee, including the trustee of a foreign settlement, where he refuses to execute the trust [*Palairet v Carew* (1863) 32 Beav 564; *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121] or has mismanaged the trust [*Ex Parte Phelps* (1742) 9 Mod Rep 357; *Ex Parte Reynolds* (1800) 5 Ves 707; *Peatfield v Benn* (1853) 17 Beav 522] or has disqualified himself by his circumstances or conduct from continuing to hold the office [*Millard v Eyre* (1793) 2 Ves 94] or may perhaps do so if his continuance in office would be likely to be detrimental to the trust owing to his being out of

A sympathy with its objects [*A-G v Hardy* (1851) 1 Sim NS 338 at p 357] and with the beneficiaries. A trustee will not, however, be removed against his will on account of a pecuniary embarrassment which has ceased to exist and which does not appear to have imperiled the interests of the beneficiaries [*Re Bridgman* (1860) 8 WR 598].

B *Story's Equitable Jurisprudence*, s 1289 has the following commentary which was cited with approval by the Privy Council in *Letterstedt (now Vicomtesse Montmort) v Broers & Anor* (1884) 9 AC 371:

> ... it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property to shew
C a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

In *Yusof bin Ahmad & Ors v Hongkong Bank (Singapore) Ltd & Ors* [1990] 2 MLJ 326, Chan Sek Keong J (as he then was) held that a trustee who failed to comply with the directions of the testator may be removed by the
D court even if no harm has been done to the beneficiaries or to the trust. 'Friction or hostility between trustees and the immediate possessor or the trust estate is not of itself a reason for the removal of the trustees' [*Letterstedt v Broers & Anor* at p 389, per Lord Blackburn]. However, where the acrimonious relationship between parties was compounded by the failure
E of the trustees to properly discharge their duties in the interests of the estate or beneficiaries, the court held that there was 'sufficient cause' to revoke the probate [*Jigalal Kantilal Doshi & Ors v Damayanti Kantilal Doshi & Ors*].

Much was said by the plaintiffs' witnesses against Cheng Poon, Richard
F and Howard. But much was also said by Richard and Howard that did not reflect well on their conduct as executors and trustees. There ought to be no complaints from Cheng Poon's side if only Richard and Howard's testimony is considered. First, it should be said that Cheng Poon and Richard were not accountable for Howard's conduct. But there was a oligarchy in Pykett Avenue, and Howard's conduct as an executor and
G trustee could not but also reflect on Cheng Poon and Richard, and Howard's conduct, though he is not a trustee under the 1990 wills could not be regarded.

It should not be lost that Cheng Poon, Richard or Howard, either jointly and severally, were administering the estate (in Thailand and the
H US) or petitioning for probate of the estate (in Malaysia). Richard was and is the Managing Director of Khaw Bian Cheng Sdn Bhd and the Thai company. In all their acts and deeds, with regard to the estate, Khaw Bian Cheng Sdn Bhd and the Thai company, they were dealing with estate property and they had to account to the estate and the beneficiaries. They were in de facto control of the entire estate. All three conducted themselves
I as the (majority) executors and trustees of the deceased. Richard and Howard petitioned and were granted probate of the Thai estate whilst Howard petitioned and was granted probate of the US estate. Cheng Poon

and Richard were the only directors of Khaw Bian Cheng Sdn Bhd. Richard is also the Managing Director of the Thai company. They were the only persons with actual knowledge of the affairs of the estate and with a fiduciary duty to inform the other beneficiaries. Against that backdrop, their conduct should be judged.

Lest it is not obvious, 'it is the first duty of an accounting party, [including a trustee] ... to be constantly ready with his accounts [*Pearse v Green* (1819) 1 Jac & W 135, per Plumer MR]. He must not only keep proper accounts, and allow a cestui que trust to inspect them, he must also, on demand, give a cestue que trust information and explanations as to the investment of and the dealings with the trust property [*Springett v Dashwood* (1860) 2 Giff 521]. Some cases apparently lay down that the trustees must, prima facie actually render an account to each cestui que trust, and that it is not enough merely to make an offer to him, or his accountant, or some other person, to inspect and take copies' (*Equity and the Law of Trusts* (4th Ed) by Philip H Pettir, p 492).

With regard to the Thai estate and Thai company, Richard showed he was totally inept, said on the basis it was not intended, as an executor and trustee, as he had not the faintest idea of his duties. He admitted that he could not provide the Thai accounts as at the date of death of the deceased. He admitted that he did not know he had to provide such an account. He admitted that for the past four years he had not shown the accounts of the Thai company to any of the plaintiffs.

Richard also showed he was dishonest. He admitted that from April 1996, as Managing Director of the Thai company, he was receiving an unauthorized monthly salary of Baht40,000. He admitted that he knew he had to have the approval of the company. He admitted that he had not informed the plaintiffs of that Baht40,000 salary.

There were other transgressions, and it could either have been ineptness or dishonesty, as well. Richard said that it was not true that the deceased had a lot of money in Thailand but he would not furnish any account. Richard revealed that he took charge of the Thai company after the resignation of the Thai manager and that the rentals from Thai properties was about Baht150,000 per month. Nevertheless, he has not rendered an account of the rentals received. Richard related that Cheng Poon, Howard, himself, his sister, Cheng Liat and the Thai manager are the present directors of the Thai company. But he admitted that there was no meeting to appoint his sister and Howard as additional directors. He admitted that his father appointed his sister and Howard as additional directors. He admitted that he did not inform the other beneficiaries of the appointment of the additional directors. He admitted that he did not inform the beneficiaries of the tenancy agreement between Khaw Bian Cheng Sdn Bhd and Glashaus Sdn Bhd a company in which his mother is a director.

With regard to the petition for probate in Thailand, perhaps Richard and Howard had valid reason, because of Thai inheritance laws and because a petition for probate could be in the estate's interests, to prosecute

their petition for probate despite Cheng Bok and Cheng Liat's objections. Richard agreed that the plaintiffs applied, in 22–271–94, to restrain his application for probate in Thailand. But he admitted that the first to third defendants had not disclosed, in 22– 271–94, that they were yet proceeding with the petition for probate in Thailand. He admitted that he did not inform the other beneficiaries of the proceedings in the Thai courts as he and the other beneficiaries were not on speaking terms. He admitted that he did not see it fit, at any time, to inform the Thai courts of the plaintiffs' actions in Malaysia or to disclose to the Malaysian courts of the petition in Thailand. Surely, that could not have been the conduct of an impartial executor and trustee?

Richard also showed he was not of truthful character. He testified that the deceased disliked jewellery and never wore rings or watches. 'His passion was cars.' The latter was said in answer to questions on the watches of the deceased. He was contradicted by his witness (Yeoh Keat Chye) who testified that he would normally drive the deceased to watch shops. Richard testified that his family disposed off their cars, even though after the recovery action (22–299–95) was filed, to raise money but not to avoid the recovery action. But he did not explain why funds were so urgently needed to be raised by the sale of their cars when his family had millions in their pockets. On the other hand, the overpowering impression from Richard's testimony was that the cars were sold to avoid the recovery action. Richard agreed that he sold the BMW after he received Cheng Bok's letter, inter alia, enquiring whether the BMW was the property of the estate. It was improbable that that sale of the BMW 735 was not a reaction to Cheng Bok's letter. Richard said that the Toyota Estima purchased in 1991 was sold in 1994 as his family could not afford the instalments. Even that was improbable, as the Toyota Estima purchased on instalments terms in 1991 would have little unpaid in 1994 and Richard's family with their millions were well able to settle the remaining instalments and/or redeem the car. Richard did not offer any reason for the sale of the Rolls- Royce, Mercedes Benz 380, the Ladybird, Peugeot, Chrysler Alpine and such other cars there were. He said that notices were sent to the plaintiffs of the meetings in Thailand but also said that he had not held any meetings in Thailand. When he was asked, 'so, your family did as it pleased', he offered no answer. He testified that none of the $^{146}/_{147}$ lands of the Thai estate had been sold, charged or pledged. It turned out that the estate had $^{131}/_{132}$ lands; 15 had been sold; one had been charged by Cheng Poon, Richard and Howard on or about 12 July 1996.

Howard conducted the affairs of the US estate through proxies. At the expense of the estate, he retained the services of an attorney (Douglas Newman) and an accountant (Gary Hockman) to assist him. He said that he sold the Benson land and the Racquet Club condominium in Arizona, with the approval of the US courts, to pay US taxes. But he had no respect whatsoever for Malaysian courts. On 25 May 1995, he was served with an

injunction restraining him from selling the properties of the estate. Yet, he concluded the sale of Racquet Club condominium. For that, he was found in contempt of court by Hamid J. He would not render any account of the US$237,000, approximately, being the sum received from the sale of the Benson land and Racquet Club condominium and from the Malaysian and Thai estates, to any of the plaintiffs. It was only produced in the course of the trial by DW8. Before he was formally appointed by the courts in the respective jurisdictions, he received Cheng Bok and Cheng Liat's notice of withdrawal of consent to his appointment as the legal representative of the US estate and Cheng Bok's notice of withdrawal of consent to his application for probate in Thailand. Yet, he proceeded with both petitions. The following exchange should be highlighted:

> Mr Khoo: The excuse in the States was to pay taxes. What is the excuse for the petition, despite the protests of the plaintiffs, to proceed in Thailand?
>
> Howard: No excuse, my lord.

He applied to the US courts for administration of Ooi Geen Peen's estate in the US. On 10 May 1995, he was appointed the administrator of Ooi Geen Peen. He did not inform the other beneficiaries. He did not inform the plaintiffs of any of the proceedings in Thailand.

Howard was less than genuine in the witness box. He was totally abandoned. On a flimsy ground — 'After the sale (Teluk Bahang land) to the buyer obtained by Hamid felled through, Hamid blamed Richard and I as the cause of him being out of the deceased's favour. He (Hamid) was upset over his (financial) loss ...' — he accused Hamid of having given false evidence to take it back on his family. Knowing there was no factual basis, he accused Hamid and Dr Gafoor of having conspired to fabricate their evidence — Howard: 'Dr Gafoor was introduced by Hamid Merican. They are very close friends as well as business associates. Hamid Merican, I believe, prompted Dr Gafoor to lie. I have no factual basis for what I say'. Knowing it was not true, since he was party to the resolution on 12 July 1996 authorising the charge of one of the Thai properties, he testified that none of the Thai properties had been sold and that no dealing had been entered into. And as said, he intemperately accused Say Bee and Beng Tatt of having been suborned by his uncles.

It was so clear that Richard and Howard run the Thai and US estates as their fiefdoms. The beneficiaries were not informed. The beneficiaries were not given accounts. The beneficiaries were ignored. Objections were of no consequence. The receiver and manager received little co-operation and was pushed from lawyer to lawyer. Court orders were disobeyed. A clandestine petition (Estate of Ooi Geen Peen) for probate was made without the knowledge of the other beneficiaries. Salaries were taken without lawful authority. Additional family members (Howard and Gim Chuan) were appointed without lawful meetings. A large sum (the rental from Thai properties) remains unaccounted for. And that is only going by the account of Richard and Howard from the witness box.

There was no evidence that Cheng Poon had actively participated in all his sons' activities. But he was the so-called governing trustee, and once he accepted the office of trustee, 'he must discharge its duties, so long as his character of trustee subsists [*Moyle v Moyle* (1831) 2 Russ & M 710 at p 715]. The law does not recognize any distinction between active and passive trustees, and a trustee will be fully liable to the cestuis que trust for any loss that occurs, where he has left the management of a trust to a co-trustee [*Bahin v Hughes* (1886) 31 Ch D 390] (see Philip H Pettir at p 272). In the instant case, Cheng Poon's inactivity amounted to his tacit approval of all that was wrecked by his sons and to his dereliction of duty to safeguard the interests of the estate and of the beneficiaries as a whole. He appointed his children, Howard and Gim Chuan, as additional directors without lawful meetings and without consulting the other beneficiaries who had the majority interests. He showed he had no regard whatsoever for any of the other beneficiaries. He would not even answer his accusers/beneficiaries by the giving of his account from the witness box.

Certainly, there was no due and proper administration of the estate. According to Mr Foo, Howard had even lost control of the US estate to a creditor. Truly, Cheng Poon and his sons (even if the 1992 wills are valid wills) had disqualify themselves by their conduct from continuing the office. Their neglect of duty or inaccuracy of conduct, their acts or omissions showed a want of proper capacity to execute the duties, of honesty and of reasonable fidelity, whether they spent much time or not [*Re Duke of Norfolk's Settlement Trusts* [1978] 3 All ER 907], they took as allowance for their care and trouble which was not allowed [*Robinson v Pett* (1734) 3 P Wms 249]. Judging by the events from June 1992, it could be fairly said that the estate if left in their hands would probably be loaded and rendered of little value (see Philip H Pettir at 318). They just did not show that they had the interests of the beneficiaries as a whole. All three displayed, and their conduct both before and after the death of the deceased must be considered, that they are not proper persons to look after the interests of the estate and beneficiaries as a whole. Their continuance as executors and trustees would be detrimental to the estate and would further imperiled the interests of the other beneficiaries. The objective test is the due and proper administration of the estate, and in the instant case, there is more than sufficient cause to discharge Cheng Poon and Richard as executors and trustees of the estate.

The forfeiture clause

On the basis that more than RM40,000 was spent on the funeral of the deceased, Mr Khoo submitted that the beneficial interests of Cheng Poon, Richard and Howard under the 1990 or 1992 wills should be forfeited.

Clause 3 of the 1990 Malaysian will reads as follows:

> I direct my trustees to spend not more than Malaysian Ringgit Forty Thousand (RM40,000) for my funeral which should conform to Chinese

> custom such as using Chinese coffin of hard wood and the performance of 'Choo Soon' and 'Kong Teik' ceremonies.

Clause 12 of the 1990 Malaysia will read as follows:

> All persons mentioned in this will shall act in accordance with my order as stated in this will. Anyone neglecting to act accordingly shall have his rights in this will forfeited from receiving his share of the estate, and his portion of his entitlement shall revert to the estate.

An identical provision is found in both the 1990 Thai and US wills.

However, the plaintiffs did not plead that the beneficial interests of Cheng Poon, Richard and Howard should be forfeited for their failure to comply with the direction of the deceased on the total expenses of his (the deceased) funeral. It only transpired in the course of the trial (during the examination of Beng Tatt) that an additional sum of about RM14,000 could have been spent by the Thai estate on the funeral expenses. But even if it was true that Cheng Poon, Richard and or Howard had expended more than RM40,000 on the funeral, the plaintiffs never sought to amend their pleadings. Accordingly, there was never any notice to the other party that the plaintiffs would be seeking an order on that ground. And even if the pleadings had been amended, it was not satisfactorily proved that a sum of more RM40,000 was spent on the funeral. Other than the accounting entry that was disputed by Howard, there was no other evidence that more than RM40,000 could have been spent on the funeral. Surely, with a singular accounting entry, and even that disputed, and whereas the order of a forfeiture would be draconian, the court should be slow in acting on a solitary bit of disputed evidence and in ordering any forfeiture.

Exemplary damages

There is a prayer for exemplary damages, and Mr Khoo submitted that this is a proper case for the award of exemplary damages; he proposed RM5m.

Generally damages are directed to the compensation of the plaintiff for the harm done; exceptionally, a plaintiff may look also to the punishment of the defendant. Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can only apply where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as is sometimes put, where he acts in contumelious disregard of the plaintiff's rights. The torts where exemplary damages are most likely to feature are those which affect the person, rather than those which affect property, since outside personal injury, the former require intentional, even malicious, conduct on the part of the tortfeasor. Beyond this, however, the courts have allowed exemplary damages in torts which affect property, where there has been a wanton intentional interference by the defendant (*Mayne & McGregor on Damages* (12th Ed) paras 207–208; see also *McGregor on Damages* para 406).

Lord Devlin in *Rookes v Barnard & Ors* [1964] AC 1129 at p 1226 restricted the award of exemplary damages to situations where they are 'oppressive, arbitrary or unconstitutional actions by servants of the government' or where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff' and where statute expressly authorized it [see also *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352].

The objective of an award under this category is to punish the defendants and to display the court's indignant attitude towards the acts committed by the defendants [*Roshairee bin Abd Wahab v Mejar Mustafa bin Omar & Ors* [1997] 2 AMR 2044]. But before considering any exemplary damages, it must be considered whether the award in mind for compensatory damages would be adequate [*Chong Siew Chiang v Chua Ching Geh* [1995] 1 MLJ 551].

In the instant case, there was no evidence that Cheng Poon, Richard and Howard's conduct was calculated to make a profit for themselves which would exceed restitution. The restitution of the cars/sale proceeds and 'monetary gifts' would adequately compensate the estate. That Cheng Poon and Richard would not be executors and trustees itself would be some form of punishment. The executors and trustees of the estate would not be estopped, should they uncover any so far unrevealed torts against the estate whilst it was under the management of Cheng Poon, Richard and Howard, from bringing a suit on behalf of the estate. Still, there was wanton disregard of the rights of beneficiaries [see *Ooi York Choo v Lim Song Foundry* [1963] MLJ 87, where the court awarded exemplary for the defendant's wanton disregard of the plaintiff's rights over her land] that cannot be condoned. That all beneficiaries (save for Cheng Hum and Grace who had their own agenda) were united in their cause was genuine demonstration of their utter dissatisfaction with their so-called trustees. It is imperative that the first to third defendants be punished to express the court's abhorrence at their shabby and deplorable treatment of beneficiaries in whose name they assumed the character of trustees. Having regard to the facts and circumstances of the case and to the substantial worth of the estate, an award of RM500,000 as exemplary damages which would not cripple Cheng Poon, Richard and Howard would be just and adequate.

The orders

In the premises of all that has been said, the court pronounces for the force and validity of the last will and testament dated 24 October 1990 of Khaw Bian Cheng, the deceased in this action and pronounces against the force and validity of the alleged last will and testament dated 3 August 1992 of the said Khaw Bian Cheng (for an order for and against a will and the grant of probate to the trustees, see 32 *Atkin's Court Forms* (2nd Ed, 1996 Issue) Form 125).

The court orders furthermore:

(a) that Cheng Poon and Richard are hereby discharged as executors and trustees of the estate of the deceased;

(b) that probate of the wills dated 24 October 1990, upon their petition, be granted to Cheng Bok and Teik Lim, the remaining executors and trustees, under O 71 of the Rules of the High Court 1980 and without inquiry on the formal and substantial validity of the 1990 wills;

(c) that Cheng Poon, Richard and Howard do pay to the plaintiffs the sum of RM500,000 as exemplary damages;

(d) that Cheng Poon do pay the sum of RM934,063.70 (being RM197,000, RM512,063.70 and RM225,000) to the estate;

(e) that Richard do pay the sum of RM121,567.35 to the estate;

(f) that the estate do deduct the sum of RM577,000 (being RM225,000, RM39,000, RM182,000, RM31,000 and RM100,000) from Howard's interests and the sum of RM131,000 (being RM31,000 and RM100,000) from Gim Chuan's interests, in Khaw Bian Cheng Sdn Bhd;

(g) that Cheng Poon and Richard do pay the estate the sum of RM225,000 received by Bok Eng;

(h) that Cheng Poon do execute a good and registrable memorandum of transfer of lands known as Holding Nos 6767 and 678, Mukim 2, Daerah Barat Daya, Penang (Teluk Bahang land) in favour of the executors and trustees of the estate and do deliver the said duly executed memorandum of transfer together with the document of title to the executors and trustees within 30 days from the date hereof, failing which, the learned senior assistant registrar do execute the said memorandum of transfer and the Registrar of Titles do cancel the present title and issue a new title;

(i) that Cheng Poon and Richard do return the following cars, videlicet, Rolls-Royce, Mercedes-Benz 380, BMW 735, Nissan 300, Chrysler Alpine, Toyota Estima and Peugeot to the estate and or render an account of the sales proceeds and pay the sales proceeds to the estate within 30 days from date hereof, failing which, the learned senior assistant registrar do conduct an inquiry on the value of the said cars, and that Cheng Poon and Richard, in the latter event, do pay the sum assessed by the learned senior assistant registrar to the estate;

(j) that Cheng Poon do render an account of the monies in the joint account of the deceased/Cheng Poon and an account of all monies transferred from any of the deceased's banking accounts to Cheng Poon's account and/or to Cheng Poon's account with his wife and/or other members of his nuclear family, within 30 days from the date hereof;

(k) that the estate do pay the sum of RM140,000 to Cheng Bok and the sum of RM866,000 to Cheng Liat;

(l) that all monetary awards hereinbefore shall carry interests at the rate of 8% per annum from the date of filing of the respective claims (save that the award of exemplary damages shall carry interests from 1 June 1998) till date of satisfaction.

(m) that the legal costs of the plaintiffs and fourth and fifth defendants be taxed and paid out of the estate in due course of administration; and

(n) that the first to third defendants are to bear their own legal costs.

Order accordingly.

Reported by Loo Lai Mee